

Chapter XX

GLOBAL DIVERSITY AND INTERNATIONAL EMPLOYMENT

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I INTRODUCTION

Over the past 30 years, many countries have passed some form of regulation to promote diversity in the workplace. Although diversity management is a common imperative for multinational corporations, the evolution of legal and regulatory developments reveals a landscape filled with varied and multidimensional approaches. In the past several years, different regions of the world have experienced unique successes and challenges in achieving workplace diversity. While many law firms and Fortune 500 companies in the United States have embraced diversity initiatives as a whole, the European Union has pioneered efforts to achieve gender parity in corporate management, and countries in Asia have set progressive quotas to increase the representation of disabled employees. This chapter addresses some of these recent initiatives to promote corporate diversity in the multinational workplace as well as the particular challenges that corporations with a global presence may encounter in the administration of both internal and legally mandated diversity initiatives. These challenges include barriers to the collection and retention of employee diversity statistics imposed by international privacy regulation, the difficulties in adapting an integrated diversity initiative to regional demands, and the ever-present gaps between legislation and enforcement.

In a world populated by an increasing number of multinational corporations, diversity management has not only become an issue of strategic importance, but also a driver of economic and competitive success. Not only does an increasingly diverse workforce mean better access to resources and customers, greater legitimacy in heterogeneous societies, and opportunities for learning and innovation, but corporations also perceive added value in distinguishing themselves from their homogenous competitors. In

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addition to being driven by business incentives, diversity initiatives sometimes are externally imposed in the form of equal employment opportunity, affirmative action and other initiatives aimed at eradicating prejudices and stereotypes that historically have limited the representation of disadvantaged groups. The proliferation of private and public diversity initiatives in recent years has been the result of these complementary forces.

II RECENT DIVERSITY INITIATIVES

i Positive discrimination

While most countries have laws prohibiting discrimination against members of protected classes, some jurisdictions have gone a step further by enacting laws requiring ‘positive discrimination’ (i.e., the practice of giving an advantage to a certain group to increase diversity or combat prejudice). In the United Kingdom, for example, employers are legally required to implement ‘positive action’ in their recruitment processes under the Equality Act of 2010. The Act allows employers to favour an applicant if the employer believes that the applicant experiences a ‘disadvantage connected to the [protected] characteristic’, and that positive discrimination will ‘enable or encourage persons who share the protected characteristic to overcome or minimise that disadvantage’. A similar regulation was signed into law in 2007 in South Africa. The EU has also passed regulations that allow for participating Member States to take positive action to promote workplace equality.²

In India, there is a constitutional basis and ‘reservation’ programme in place to allocate a quota of public service positions for traditionally under-represented groups. These under-represented groups include certain castes and religious minorities. Similarly, Malaysia and Nigeria also have affirmative action programs for public service employees in order to attain the desired balance of ethnicities. In contrast, however, outright ‘quota’ programmes have been rejected for the most part in the United States by the Supreme Court, where the prevailing philosophy is for employers to make ‘blind’ determinations with respect to race, national origin, sex and other protected classes. As typically well-represented groups (e.g., white males) can claim ‘reverse’ discrimination under Title VII and other discrimination statutes, employers must carefully design diversity programmes to avoid legal claims by employees who claim to have been disfavoured or excluded by diversity initiative programs.

Further complicating matters for US federal contractors, the Office of Federal Contract Compliance Programs has set forth regulations for contractors to benchmark, inquire and take positive action to ensure appropriate representation of veterans and individuals with disabilities. For employers in the US interacting with the finance sector, Section 342 of the Dodd-Frank Act establishes an office at every relevant federal agency to monitor and ensure the fair inclusion of minorities and women for every company and vendor governed by the Act.

2 See, e.g., Racial Equality Directive 2000/43, 2000 OJ (L 180) 22 (EC); Employment Equality Directive 2007/78, 2007 OJ (L 303) 16 (EC).

ii Gender quotas on corporate boards

Legally mandated gender quotas on corporate boards are one apparently effective form of positive discrimination that has taken hold in Europe. These metrics serve as a regimented means of removing inequities in the corporate board room and promoting women's economic interests. Before the first gender quota came into effect in 2003, the problem of female under-representation was strikingly apparent. While the proportion of women in the workforce was continually increasing in most jurisdictions, this growth did not translate into increased representation on corporate boards.

Norway was the first nation to enact a legally mandated gender quota in 2003 and is the only country whose deadline for compliance has passed. Before the quota, women represented a meagre 6.8 per cent of board directors in Norway. In response, the Norwegian parliament approved a rule requiring corporate boards to consist of 40 per cent women by 2008. The quota applies to all publicly owned corporations and public limited liability companies in the private sector. Affected corporations had until 1 January 2006 to voluntarily comply with the quota rule, after which time compliance became mandatory. The result was full compliance with the mandate by 2009, and in 2010 the percentage of female directors had increased to 40.3 per cent. The gender quota law has had and continues to have an undeniably positive impact as evidenced by Norway's No. 3 ranking in World Economic Forum's 2013 'Global Gender Gap Report'.

Over nine years after Norway enacted its groundbreaking gender quota, many other countries have followed suit. In 2011, Belgium, France and Italy all passed laws establishing quotas for women on corporate boards, and in places like Australia, Sweden and the United Kingdom, governments have threatened to follow suit unless corporations undertake such steps voluntarily. A number of other countries also have laws that require that gender be taken into account in appointing board members and that companies report on the gender balance of their boards. And in November 2013, the European Parliament voted in favour of legislation proposed in 2012 that would set an objective of 40 per cent women among non-executive directors of companies listed on stock exchanges. Legally mandated gender quotas are also starting to appear outside Europe as well. In 2011, for example, Malaysia's Ministry of Women, Family and Community Development succeeded in passing an amendment to the 2004 regulation requiring 30 per cent female directors on boards in the public sector. Similarly, Brazil has a 40 per cent target for female representation on the board of state-controlled enterprises.

iii Pay equity regulation

Equal pay for men and women has also become a hotly discussed topic around the globe. In the area of pay disparity, gender creates the widest gaps of any protected characteristic.

In the United States, the issue has become a lynchpin of congressional debate in the last few years. In January of 2009, President Obama signed into law the Lilly Ledbetter Fair Pay Act to supplement existing pay equity legislation. The Act effectively extends the time in which an individual can bring an equal pay discrimination claim. Other bills also have been introduced that are aimed at enabling women and other victims of pay discrimination to challenge unequal pay more easily.

Other countries also continue to confront pay disparity issues. Although foundational treaties in the EU guarantee equal pay for work of equal value for all

citizens, the gap between men's and women's hourly gross earnings throughout the entire EU remains at approximately 16 per cent, and several Member States have adopted remedial measures in recent years. The French parliament introduced legislation in 2006 that required firms to develop a framework to eliminate pay disparity by 2010, and in the United Kingdom, the 2010 Equality Act obligates a corporation with over 250 employees to disclose pay information with the intent to expose gender discrepancies. The issue of pay equity has garnered attention outside the EU as well. In the Philippines, for example, the Senate approved a bill in 2012 that would protect women from discriminatory compensation policies in all areas, including wages, salary and employment benefits.

iv Sexual and moral harassment policies

A recent uptick in sexual and moral harassment legislation also evidences an increased focus on diversity awareness and sensitivity in the workplace. Developments in India have focused on gender and gender programmes, with India's Supreme Court recognising the legal rights and status of transgendered individuals as a 'third' gender and the Indian parliament's enactment of a wide-reaching sexual harassment law. The sexual harassment law mandates workplace committees and a range of penalties to protect women from unwelcome sexual advances, comments and conduct in the workplace. This law is unique in that it also covers third parties in the workplace, including clients, customers and daily wage workers.

In the EU, some Member States have recently addressed the problem of workplace harassment by placing an affirmative duty upon employers to prevent and redress this behaviour. In Germany, the General Act of Equal Treatment, enacted in 2006, places a duty upon employers to protect employees from not only discrimination from superiors and co-workers, but from third parties as well. The Croatian Labour Act similarly requires that employers protect their workers from the harmful, unwanted conduct of superiors, colleagues and third parties. And sexual harassment appeared as prohibited conduct in Turkish legislation for the first time in 2003.

Also interesting is the recent passage of sexual harassment legislation in several countries that have not historically focused on these issues. China, for example, recently passed progressive legislation that gives victims of sexual harassment a cause of action under Chinese law. In 2005, China's national legislature amended the Women's Protection Law to explicitly prohibit workplace harassment, but, at the time, the law did not impose obligations on employers to prevent harassment in the workplace. In 2012, however, the Special Provisions on Occupational Protection for Female Employees took effect and gave victims of harassment a mechanism to redress their claims under Chinese tort law. Under these regulations, unless an employer establishes a corporate anti-harassment policy, it may be liable for negligently or intentionally failing to stop harassment it knew or should have known could occur.

Progress also is apparent, although not as far-reaching, with respect to anti-discrimination initiatives for lesbian, gay, bisexual and transsexual (LGBT) employees in the global workplace. In Europe, the EU's Charter of Fundamental Rights was the first international instrument to explicitly include the term 'sexual orientation', and Article 13 of the European Commission Treaty prohibits discrimination based on sexual orientation. Member States vary in their application of this anti-discrimination

law. The Equality Act in the United Kingdom makes it direct discrimination to treat LGBT employees unfavourably on the grounds of their sexual orientation. The anti-discrimination provision applies to all areas of employment, including terms of contracts, pay, promotions, transfers, training and dismissal. Similarly, in Germany, the 2006 General Law on Equal Treatment defines sexual orientation to encompass discrimination against transsexual as well as lesbian, gay and bisexual employees. These policies stand in stark contrast to the laws of several countries where homosexuality and homosexual acts are legally prohibited. Countries such as Libya, Singapore and Algeria permit employers to discriminate based on sexual orientation and some even punish homosexual acts with protracted periods of imprisonment.

Indicative of this dichotomy is India. As noted above, India's Supreme Court recognised transgender people as constituting a legal third gender in April 2014, grounding its decision on rights guaranteed by the nation's Constitution as well as international law, and determining that gender identity and sexual orientation are fundamental to the rights to self-determination, dignity and freedom. In December 2013, however, a two-person bench of the Supreme Court put a colonial-era portion of the Penal Code (Section 377), which described homosexual acts as 'against the order of nature' and punishable by up to life in prison, back into law after a 2009 ruling by the Delhi High Court struck down Section 377 as unconstitutional. Although the Supreme Court ruled that only the parliament can make changes to the law that bans consensual same-sex sexual activity, a curative petition to re-examine the Supreme Court's decision is still pending.

Stop-and-go progress on LGBT rights is a common theme around the world. Although the Supreme Court of the United States recently paved the way for gay marriage, the country's federal anti-discrimination statutes still do not protect LGBT members on the basis of sexual orientation. Furthermore, many employers now struggle with policy decisions over health insurance coverage of transgendered employees, including, for example, whether to cover sex-change surgeries. As this issue continues to make headlines, we note there will likely be many more legal developments on LGBT protections in upcoming years.

III CHALLENGES FACING MULTINATIONAL CORPORATIONS

It is clear that with such varied legislation across the globe, multinational employers must keep abreast of a panoply of regulations, laws and international policies. On top of this challenge, global corporations also may face a unique set of difficulties in implementing and administering internal diversity initiatives. These challenges include adapting an integrated diversity policy to a specific locale, gathering statistical data to measure the success of diversity programmes and understanding the complexities of the source of law and enforcement in each region.

i Global integration versus local responsiveness

In order for a global diversity policy to be successful, it must be tweaked to accommodate the culture and social context of each region and continually monitored and adjusted. Studies have shown that policies created in one country and exported to another often

lack the cultural legitimacy to be effective in other management situations. Differing attitudes towards corporate diversity and distribution of power among groups are common examples of the cultural differences that make wholesale exportation of a diversity management programme difficult. For example, an overt emphasis on employee heterogeneity is uncommon in France, where it is illegal to register employees as members of an ethnic group. In China, gender stereotypes from thousands of years of feudal despotism still linger in a modernised, industrial society. As a result, lax diversity policies often result in tokenism rather than substantive change. Finally, differences in protected categories may cause difficulties in translating anti-discrimination policies aimed at remedying historical disadvantages. In Hong Kong, for instance, local ordinances prohibit discrimination on the grounds of gender, pregnancy, marital status, disability, race and family status, but do not offer protection on the bases of religion or sexual orientation. Moreover, in India, caste is a protected category. International corporations should be aware of these differences throughout the implementation of an integrated diversity strategy.

ii Tracking progress

In order to gauge the success of corporate diversity policies, employers must also be able to gather statistics on employees and measure progress. However, the collection of sensitive data is difficult in light of regulations aimed at protecting data privacy. In the EU, employers collecting identifying information regarding employees must disclose the purpose of these statistics before storing and transferring the data. Employers must obtain consent from employees when seeking to use the information for purposes other than those communicated or when transferring the information to a third-party for a different purpose. Moreover, individual Member States often have their own data privacy laws that further complicate data collection and reporting. The French Data Protection Act, for example, prohibits employers from collecting 'sensitive data', including information relating to racial or ethnic origins, political, philosophic or religious opinions, trade union affiliation, health or sexual identity. The Act also limits the length of time that employers may store employee's personal data. These regulations make it extremely difficult, if not impossible, for employers to track the progress of their diversity programmes.

Statutes similar to the EU model have recently come into effect in India, Korea, Malaysia, Mexico, and the Philippines, among other jurisdictions. In India, the 2011 Amendments to the Information Technology Act provide that corporations must obtain consent in writing before gathering personal data or sensitive information. In Malaysia, the Personal Data Protection Act imposes strict limitations on the transfer of personal data outside the country, with limited exceptions similar to those embedded within the Safe Harbor Principles. The Law on the Protection of Personal Data Held by Private Parties and the related Data Privacy Regulations enacted in Mexico are somewhat more lax in that they allow cross-border transfer of data within a corporation as long as Mexican employees are given rights of access and objection, and the corporation meets certain security requirements. As a greater number of countries enact detailed data privacy laws, multinational corporations must continue to be sensitive to regional legislation and maintain strict compliance with local laws.

iii **‘Unconscious’ bias training**

An increasingly popular trend related to diversity and inclusion initiatives is the recognition of, and mitigation against, ‘unconscious’ or ‘subconscious’ bias in decision-making through awareness training. For example, unconscious assumptions can often overlap with common stereotypes: ‘women are more emotional than men,’ ‘assertive women are too ambitious,’ ‘persons with disabilities can’t perform as well,’ and ‘older people are out of touch with technology.’ Though unconscious biases may not necessarily lead to biased decisions in the workplace, they may predict discriminatory non-verbal, subtle behaviours, such as sitting further away from someone, cutting interviews short, evaluating someone more poorly, or disciplining someone more frequently. These types of behaviours can lead to negative consequences, such as poor morale, bad publicity, loss of time and productivity, and erosion or loss of client relationships.

Significantly, employment courts in the United Kingdom long have accepted that discrimination can be a result of subconscious and unintentional bias. For instance, the Equality and Human Rights Commission has written, as part of non-binding guidance, that ‘Employers may have prejudices that they do not even admit to themselves or may act out of good intentions – or simply be unaware that they are treating the worker differently because of a protected characteristic.’ As plaintiffs’ bars around the world will likely proffer this variety of ‘evidence’ to prove indirect discrimination, companies are increasingly taking a closer look at how to eliminate less overt bias in the workplace. For example, employers can encourage employees to make thoughtful, deliberate decisions in the workplace, and can use objective frameworks, such as checklists at key decision points, to encourage less biased outcomes. In hiring and promotions, employers can agree beforehand to basic merit criteria, militating against any biased tendencies that may influence decision-making. Employers can also conduct regular audits of key decisions, including hiring and promotion, to ascertain whether any patterns exist that could evidence unconscious bias in any particular parts of the business, and make sure that diverse groups of people are represented on the panel of reviewers. Companies should, however, weigh the potential downside should a record be created that may prove damaging in the event of litigation.

IV CONCLUSION

Both for strategic reasons and in response to recent legal developments throughout the world, highly successful multinational corporations are focused on promoting diversity in the workplace and implementing robust diversity management programmes. These corporations are grappling with a complex set of legal issues that are relatively new in many regions of the world and remain untested in the global marketplace. As developments continue to unfold in the legal landscape, corporations will have to monitor and adjust their diversity programmes to remain compliant. Corporations in the United States can serve as a model for many business entities that are just beginning to promote diversity. Due to a highly diverse population and a history of racial, ethnic and gender inequality, the United States has been very proactive in working toward workplace equality. Europe is catching up with legislation to address the increasingly diverse population resulting from the free movement of workers throughout the European Union. As corporations

become more diverse on all levels, these global initiatives will become more important for success in the marketplace but also will become more complex. Companies wishing to stay competitive will rely on their HR and legal advisers to aid them in navigating the wide range of regulations that affect this area.