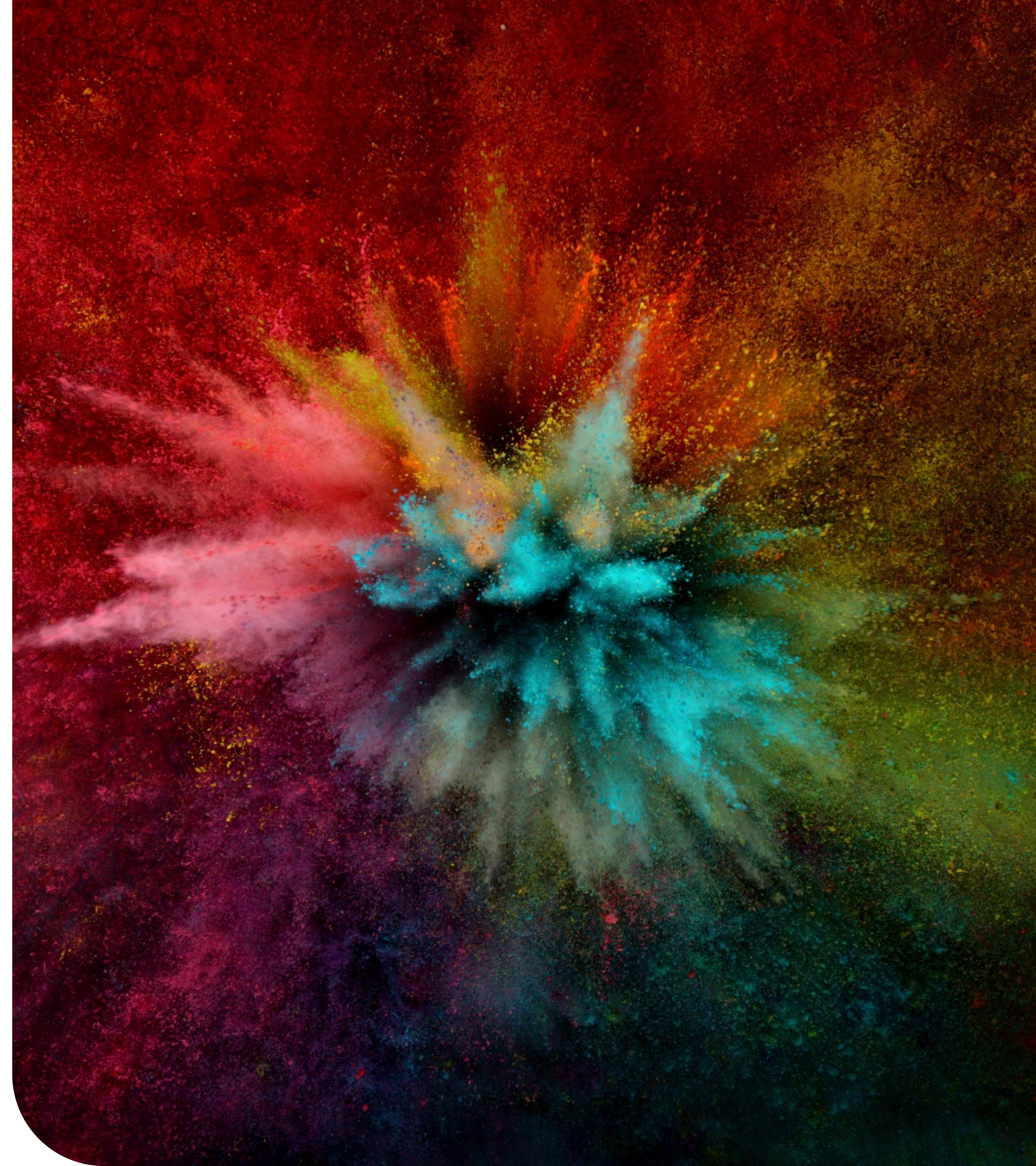


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Diversity Legal Outlook 2024



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Introduction

For global employers, the pace of change at which the diversity landscape evolves can be challenging, as they seek to develop meaningful global strategies which reflect business objectives whilst also being compliant with local laws and reflecting differing regional areas of focus. At a local level, laws and regulations cannot always keep pace with the rapidly evolving societal and cultural expectations.

In recent years, global social movements have directed the pace of change and primary focus for many corporate diversity programmes, from MeToo to Black Lives Matter. In 2023, we saw an increased regulatory focus driving the diversity, equity, and inclusion (DEI) agenda, with greater focus on data gathering, pay reporting, and the setting of diversity demographic targets. But alongside progress and greater regulatory oversight, the legal landscape has evolved in some jurisdictions resulting in an increased level of scrutiny over the use of affirmative or positive action measures, leading to some global employers revisiting their short-term diversity strategies.

In 2024 we expect to see many organisations press ahead with their DEI agendas in response to an increased regulatory focus (at least in the UK), government initiatives, increased activist pressure and standards set by non-government organisations, with greater focus on inclusion, equity, and diversity reporting. In contrast, we may also see some organisations stall or revisit their DEI initiatives in response to political pressure and legal challenge in certain jurisdictions.

Whether employers are pressing ahead with their DEI agendas, or taking stock, there are legal and commercial risks for global employers to consider as they develop their DEI strategies and objectives for the years ahead in this rapidly evolving landscape.

In this Legal Outlook, we draw upon some of the key themes across diversity, equity and inclusion impacting global employers in the years ahead.



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DEI: Where now? Navigating a safe legal path in challenging times

For any DEI strategy to be truly global but remain meaningful, tailored, and effective, organisations must understand the culture, laws and political landscape of each region in which they operate, as well as the rapidly evolving societal expectations and trends for diversity, equity and inclusion.

From data gathering, to public disclosure and reporting, to managing a potential backlash of positive discrimination, to meeting advancing regulatory supervision allegations and enforcement of DEI agendas, there are many DEI developments for global employers to manage, as the primary areas of focus on different aspects of diversity vary by jurisdiction. This can make navigating a safe legal path for global employers a challenging journey.

As the DEI landscape evolves, what will be the primary areas of focus for DEI across key jurisdictions in 2024 and beyond?

UK

In recent years the focus has been on introducing “E” to the D&I equation as employers seek to increase the **equity** within their organisations, recognising a diverse and inclusive workforce does not exist without it.

As **gender pay gap** reporting continues, the current UK Government has confirmed it will not be introducing a mandatory requirement for companies to report on their **ethnicity pay gaps**, but many employers do so voluntarily, and we expect **voluntary pay gap reporting** across other diversity strands to increase in the coming years.

Looking forward to 2024 and beyond, we expect more focus on how organisations measure **inclusivity** and the **socio-economic** makeup of their workforces, particularly at a senior level as businesses acknowledge the class ceiling in the UK and how social class can be a barrier to career advancement easily comparable to other, legally protected, characteristics.

We also anticipate **greater regulatory focus** on DEI. In 2023, the UK financial services regulators published consultation papers seeking to boost diversity and inclusion across the sector, with wide-ranging proposals that, if enacted, would mark the boldest attempt by a regulator to move the dial on diversity in its sector.

EU

Across the EU, the focus currently remains on **gender** as employers start to prepare for the implementation of two key legislations: the **EU Pay Transparency Directive** aimed at eliminating the gender pay gap; and the **Women on Boards Directive** imposing a quota of 40% of non-executive director positions by members of the under-represented sex in listed EU companies by June 2026.

The focus, however, is likely to broaden in the coming years, as companies prepare to report under the **Corporate Sustainability Reporting Directive (“CSRD”)**, requiring in-scope companies to report on historically less commonly reported strands of diversity such as disability and age, as well as disclosing details of diversity strategies and positive action policies. In addition, EU employers should be alive to legislative developments on **equal opportunities** and inclusion of persons with disabilities in the workplace as many regions look to revise their approach to the Equal Treatment Directive, as well as focus on preventing discrimination when using **AI in the workplace** as EU AI regulation develops.

APAC

There are a range of focal areas across APAC, as many jurisdictions continue with their development of basic and fundamental **anti-discrimination frameworks** (such as Singapore, where draft anti-discrimination legislation has been proposed to prohibit discrimination against specified protected characteristics, but does not focus on other areas, such as data gathering or positive action). Where anti-discrimination legislation is well established (such as in Australia and Hong Kong), there is a broad spectrum of attention, but many regions remain focused on **gender** and the protection of female employees in the workplace (such as China, Japan and Indonesia) in order to encourage women to remain in the workplace, as a key aspect of preserving an adequate workforce.

US

Following the 2023 US Supreme Court decision in *Students for Fair Admissions v Harvard and University of North Carolina*, the scrutiny and focus over the use of **affirmative action** programmes in the US continues, with increasing challenge to affirmative action measures and DEI initiatives used by private employers. However, existing DEI programmes have become a well-established expectation for employees in the US market, and employers are faced with a difficult choice of facing criticism, and potential legal challenges if they champion DEI issues, or face employee frustration and consumer criticism if they choose to withdraw support from DEI initiatives.

You might be interested in

- > [The Diversity Faculty Podcast Series](#)
- > [Employment & Incentives Legal Outlook 2024](#)

Positive action vs positive discrimination

Many organisations recognise the role that proportionate positive action measures can play in preventing or remedying workplace discrimination and fostering an inclusive culture. However, the line between what amounts to lawful positive action and unlawful positive discrimination is not always clear, and there are many legal issues for global employers to consider as the political landscape and commercial appetite for employers taking positive action evolves.

Differing language and legal frameworks

Firstly, employers should note the inconsistency in language and terminology used to describe positive action. Whilst the UK and other EU countries describe such measures as “positive action” with the reverse being “positive discrimination”, other non-European countries are more likely to use “affirmative action” and “reverse discrimination”.

“Positive action” is a way of applying preferential treatment to certain groups or persons with a particular characteristic as a means of redressing disadvantage or under-representation. As a concept, it is *prima facie* discriminatory. However, many jurisdictions have legislated to permit positive action as an effective means of achieving better diversity in the workplace and permit employers to take positive action lawfully in certain circumstances.

It is, however, imperative that global employers appreciate the differences in the way that legal regimes operate. Whilst legislative frameworks in some jurisdictions prescribe specific circumstances in which employers may take lawful positive action (such as the UK and across the EU), other jurisdictions rely on an

interpretation of case law and anti-discrimination laws (such as the US). In contrast, other jurisdictions are yet to develop fundamental anti-discrimination regimes and so the concept of positive action is yet to exist at all.

Even in jurisdictions where there is a legislative framework permitting employers to take positive action, there is often ambiguity over the extent to which employers can do so without such actions amounting to unlawful discrimination, or where government approval is needed before any action can lawfully be taken.

Evidence and proportionality

Across the myriad of legal frameworks, there is a consensus that any positive action measures need to be **carefully considered, supported by data and evidence**. This is particularly the case in the US and the recent coverage resulting from the Supreme Court case in *Students for Fair Admissions* is a helpful reminder that programmes must be sufficiently tailored, evidence-based, illustrate a close fit between their means and their ends, and subject to constant reassessment.

In the UK and across the EU, the focus is more on **proportionality**. According to the UK **EHRC Employment Statutory Code of Practice**, this need not be “sophisticated statistical data or research” but could involve looking at the profile of the workforce or consulting with workers. Across the EU, any measures must have transparent and legitimate objectives, with a direct connection to those aims.



What amounts to lawful positive action and unlawful positive discrimination has always been a grey area in employment law across many jurisdictions. As societal expectations evolve and the political landscape changes, employers must appreciate the differing legal frameworks governing such practices and the legal risks that can arise, even with actions taken with the best intentions to drive positive and meaningful change.”

Simon Kerr-Davis, Employment Counsel and Diversity Faculty member

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Caution ahead

Many employers use some form of positive action, whether that be through targeted training, network groups, or diversity targets. However, navigating a safe legal path can be challenging. **The financial and reputational risks for employers getting it wrong can be significant.**

Following the US Supreme Court decision in *Students for Fair Admissions*, there is now greater scrutiny over the use of affirmative action programmes in the US. Whilst it remains to be seen precisely how this decision will impact the way courts decide discrimination claims in an employment context, the ruling has already created a heightened risk for some organisations seeking to advance their DEI efforts.

Whilst other jurisdictions have not experienced the same backlash as the US, there is inevitably a **heightened risk** for global employers as they seek to develop meaningful strategies which are compliant with local laws and evolving societal expectations.

Where next?

The US Supreme Court's decision in *Students for Fair Admissions* suggests a shift in the anti-discrimination legal landscape. As we move through 2024, many global employers will be keeping a watchful eye on how the courts address any challenge to affirmative action programmes or other DEI initiatives in the US private employment space.

But despite the challenging environment in the US, traditional discrimination claims remain a bigger risk to organisations than reverse discrimination claims, and there are legal and commercial risks for businesses if they withdraw or stall their DEI commitments or fail to take appropriate action to avoid discriminatory practices arising.

Notwithstanding the challenging legal patchwork, some jurisdictions (such as the EU) have given a clear signal to employers to continue experimenting with positive action measures, by requiring companies in scope of the CSRD to report on specific policy commitments related to inclusion or positive action for those at particular risk of vulnerability in the workforce.

You might be interested

- > [Podcast episode four: Targets, quotas and positive discrimination](#)
- > [Positive action vs Positive discrimination: Navigating the grey area](#)



2023 reminded us how quickly the DEI landscape can evolve and our learnings from 2023 are a reminder that no DEI policy should remain stagnant, and should be subject to continuous monitoring, adjustment, and review”.

Laurie Ollivent, Employment Senior Associate and Diversity Faculty member

DEI and the role of the regulator

Diversity and inclusion are increasingly becoming a regulatory concern, as regulators recognise that good diversity and inclusion practices promote healthy cultures, sound risk management, reduce groupthink and facilitate better decision-making.

In 2023 we saw an **increased regulatory focus on diversity and inclusion**. We expect this will continue into 2024 and beyond. But what role does a regulator have in supervising and enforcing an organisation's DEI strategy and objectives? Is it appropriate for a regulator to incorporate DEI into its supervisory and enforcement frameworks? And how do global organisations deliver their DEI strategies whilst meeting various regulatory expectations, legal obligations, and societal pressures?

The regulatory DEI landscape: What's happening?

UK

In the UK, the regulators are **driving the diversity and inclusion agenda**.

2023 saw the UK's financial services regulators publish consultation papers proposing changes to boost D&I across the sector. If enacted as proposed, the new rules would mark one of the biggest attempts by a regulator to shift the dial on D&I in a sector, and set an example for other sectors, industries, and jurisdictions to follow. Whilst the D&I proposals in isolation are not new, the scale of the proposals is bold, requiring in-scope firms to publish a diversity strategy, set mandatory diversity targets, disclose annual diversity data across

many demographics including religion, ethnicity and sexual orientation, and report on a firm's inclusivity. In anticipation of the regulators publishing a final policy statement in 2024 with new rules coming into force 12 months later, many firms will be revisiting their DEI strategies and practices to align with increasing regulatory expectations.

EU

The **regulatory oversight of D&I across the EU is becoming more stringent** as new enforcement mechanisms are put in place to supervise and enforce compliance with diversity requirements, such as those prescribed by the Women on Boards Directive, and the EU Pay Transparency Directive. In addition, the CSRD gives additional tools to the market and stakeholders to hold companies accountable for their diversity practices, and the European Banking Authority (EBA) has made clear that it expects stricter enforcement on diversity issues and will hold national supervising authorities to account when supervising firms' remuneration strategies and adoption of diversity policies and appropriate gender balance targets. The EBA is also focused on other strands of diversity, as it monitors diversity of boards in terms of age, educational and professional backgrounds, and national origin.

APAC

Whilst the regulatory pace of change across APAC might not be on a par with the UK and EU, as some regions focus on developing their anti-discrimination legal frameworks, there are other **sector bodies, social enterprises and non-government organisations driving the D&I agenda** – from stock exchanges and listed company requirements setting disclosure obligations (such as in Hong Kong), to active regulators such as the Australian Human Rights Commission (AHRC) having new powers to supervise and enforce an organisation's compliance with the duty to prevent discrimination and harassment in the workplace.

Organisations need to be aware of the evolving regulatory landscape on DEI and how this impacts their strategies and objectives, whilst also being mindful of local laws and societal expectations.

You might be interested

- > [Diversity in Financial Services](#)
- > [Employment & Incentives Legal Outlook 2024](#)
- > [Financial Regulation Legal Outlook 2024](#)



Whilst there are arguments that regulators are not the right bodies to incorporate DEI into their supervisory and enforcement frameworks as organisations should remain free to design their objectives and strategies to suit their business, progress otherwise remains limited across many sectors and geographies and so arguably, regulatory focus is needed to accelerate change”.

Simon Kerr-Davis, Employment Counsel and Diversity Faculty member



The momentum of social mobility

Employers are increasingly recognising the need for workplace diversity initiatives to cover socio-economic background as well as other diversity strands. However, there are unique characteristics of social mobility which make it a particularly challenging issue to address.

These include the lack of a set definition of what constitutes being “socially mobile”, the resultant difficulties in measuring social mobility, and the lack of legal frameworks to tackle inequality arising from social class. In this article we look at developments made in this area across key jurisdictions in 2023, which have paved the way for further progress in 2024.

UK

Recent research has revealed that **social class is the biggest barrier to career progression in the UK of all diversity characteristics**¹. Despite this, there is no universally accepted way to measure social mobility in the UK. The most widely accepted benchmark is provided by the Social Mobility Commission, which primarily measures socio-economic status based on the occupation of the highest earner in a person’s household when they were aged 14. Social mobility is also not a protected characteristic under the UK Equality Act, meaning it is not unlawful for an employer to treat an employee less favourably than another based solely on their socio-economic background.

It therefore falls to employers to determine their approach towards monitoring the socio-economic background of their workforce. However, a CIPD survey published in April 2023 found that just 9% of UK employers have focused on social mobility in relation to improving inclusion and diversity in their businesses more generally². Industry bodies have begun to look

at this issue and publish guidance on a sector-specific basis. For example, the Law Society published a guide in September 2023 looking at how law firms can measure socio-economic diversity and take action based on the information collected³.

In 2024, given this increased attention and greater regulatory oversight (read more on page 6), we **expect more employers to recognise the need to focus on social mobility and drive forward measures to enhance diversity in this area.**

EU

Similarly to the UK, social mobility has historically had less focus than other diversity strands in the EU, partly because the term “social mobility” is not used consistently across EU member states as some jurisdictions focus on social origin. The Council of Europe has called for social origin to be protected in anti-discrimination law, and the ECHR already prohibits discrimination on the grounds of social origin. However, only a handful of European countries have tackled social origin discrimination in a legislative capacity.

¹ Social class is the biggest barrier | KPMG UK

² Are the barriers to social mobility being addressed in the workplace? | CIPD

³ How to boost social mobility in your law firm | The Law Society

continue reading on the next page

Given the divergence of approach across the EU, and the lack of legislative and regulatory focus, there has been a rise in employers tackling the issue through internal policies on a voluntary basis. However, whilst businesses across the EU will continue to focus on social mobility in 2024, we expect this to be with less emphasis than in the UK, not least because “class” as a concept is less of a feature in EU discourse.

APAC

Across APAC, the momentum of social mobility is driven mostly by employers as part of their internal DEI policies and strategies, with less focus and coverage by governments or regulatory bodies. Whilst there is no legal framework on social mobility across many regions in APAC, some employers are starting to have more awareness of this topic, with greater focus on wage equity across certain sectors.

The intersectionality between social mobility and other characteristics must also be recognised, with the potential for a “double disadvantage” significantly impacting a person’s career prospects and progression. Social mobility can sometimes also be used as a proxy for other characteristics, for example where the most disadvantaged in a society are more likely to be of a

particular race or religion. Championing social mobility may therefore improve the position of people with other diversity characteristics and help to achieve greater diversity in the long-term.

In the coming years, we anticipate that more companies will seek to understand the socio-economic makeup of their workforces, with increasing numbers of organisations voluntarily publishing demographic data and undertaking socio-economic pay gap analysis.

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“

Whilst the jurisdictional focus on social mobility varies across the DEI landscape, we anticipate the momentum of social mobility as a core part of workplace diversity to gather pace in the coming years, as more employers recognise that socio-economic status, social origin and social class can have a greater impact on a person’s career than other diversity characteristics”.

Laurie Ollivent, Employment Senior Associate and Diversity Faculty member

AI: Navigating threats and opportunities for DEI

The rapid advancement of AI has created new opportunities and challenges for organisations looking to foster greater diversity, equity and inclusion in the workplace.

A tool for inclusion (or exclusion?)

Throughout the employment lifecycle, the power of AI can be harnessed to minimise human bias and promote fairness, whether that be through improving language used in job adverts/ descriptions to be more inclusive, creating blind-hiring processes, using algorithms to objectively measure performance or matching mentors with mentees from similar backgrounds.

However, outputs generated by AI rather than by humans do not guarantee the absence of bias or discrimination and, without the appropriate guardrails in place, **AI can have a chilling effect on DEI.**

Discrimination can arise from the data used to train the AI system which is then used to make predictions about the future. For example, in a recruitment situation, if the dataset is based on previous successful candidates who are predominantly white and male, the AI may screen out female candidates or those from particular racial or ethnic groups, concluding that they are unlikely to be suitable. This can perpetuate existing stereotypes or biases and result in less favourable treatment of people with protected characteristics.

In the UK, the case of *Manjang v Uber* is a cautionary tale of the potential risks of AI treating certain groups less favourably. When facial recognition technology allegedly failed to verify a Black driver of African

descent, Uber found themselves facing a claim for indirect race discrimination. We expect to see more claims in the UK tribunals and EU courts challenging the use of AI in 2024 and beyond.

Whilst similar AI risks exist in the APAC region, cultural differences have shaped a different set of priorities for employees. Where employment litigation was fairly limited until quite recently, employees are currently focused on bringing more “traditional” employment as opposed to AI-related litigation.

Balancing innovation and regulation

As deployment of AI gains momentum, so too does the drive for implementing guardrails to address concerns over bias and discrimination.

UK

The government’s *white paper* set out the UK’s approach to regulating AI. Whilst not proposing to introduce new legislation or create a single regulatory function to govern AI, it lays down five principles that regulators must interpret and apply to AI use within their sectors. One of these is fairness, whereby AI systems should not discriminate unfairly against individuals. UK regulators will need to incorporate these principles into guidance to be issued this year.

EU

Through the proposed AI Act, the EU is seeking to ensure that employers’ AI systems are transparent and non-discriminatory. AI systems used in employment will be classified as “high risk”, meaning that stricter rules will apply to ensure they are safe before they can be rolled out. This includes using a high-quality dataset to train the system to minimise discriminatory outcomes and ensuring that there is an appropriate level of human oversight.

The new regulatory regime is likely to enter into force in the first or second quarter of 2024, with a two-year grace period (so it will not apply in full until 2026). However, employers in the EU who use AI are likely to start assessing the risk profile of existing or planned systems and maintaining comprehensive records in readiness for the changes.

The EU Steering Committee on Anti-Discrimination, Diversity and Inclusion and the Gender Equality Commission of the Council of Europe are developing a study on the impact of AI systems, their potential for promoting equality, and the associated discrimination risks. The results of this study may influence future regulation.

APAC

Across many regions in APAC there is developing guidance aimed at mitigating the employment risks resulting from the use of AI in the workplace, namely to address potential risks of discrimination and bias, and ensure that AI decisions do not systematically

disadvantage individuals whilst promoting fairness, ethics, and transparency in its use. Across other regions, existing anti-discrimination legal frameworks are being used to consider the impacts of AI to ensure that any use supports fair and inclusive employment decisions. In Australia, governments and regulators are also considering the potential impacts of AI on human rights, with the AHRC recently recommending a new national human rights law to reduce potential discrimination caused by AI.

You might be interested in

- > [Podcast: AI in the workplace](#)
- > [AI in the workplace: evolution or revolution?](#)
- > [There is no ‘\(A\)’ in team, or is there?](#)
- > [Tech Legal Outlook 2024](#)

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