

Balancing DEI Data Collection And Employee Privacy Rights

By **Annabel Gillham, Oliver Spratt and Laura Stewart** (September 12, 2023)

The need for effective workplace equality monitoring is expanding.

With an ever-increasing focus on environmental, social and corporate governance, companies' diversity, equity and inclusion efforts are under growing scrutiny from regulators, investors, and current and prospective employees.

The law in the U.K. is evolving, with numerous employers now under a duty to report on elements of DEI across their workforce.

However, as research from Savanta published in August found,[1] despite an increased focus on developing inclusive workplace culture, discrimination and lack of equal opportunities or pay equity remain pervasive.

With over 20% of U.K.-based employees reporting that they have faced some form of discrimination at work, employees want to see their employers doing more to improve inclusion.

The collection and monitoring of DEI data thus remains of fundamental importance.

Only by collecting DEI data can organizations understand the make-up of their workforce and become better equipped to pinpoint, report on and address any existing inequalities in employee management, such as recruitment, promotion and executive sponsorship.

Collecting and monitoring DEI data, however, gives rise to legal and practical challenges. Employers must comply with relevant data protection and discrimination laws when collecting, monitoring and, ultimately, using DEI data.

This article provides a reminder of the diversity reporting requirements currently in place for certain employers in the U.K. and considers the extent to which such requirements might expand.

It will then look at how employers can collect and process this data lawfully, offer practical points for employers to ensure that such data collection is effective, and finally highlight pitfalls to avoid when processing and using the data.

Diversity Reporting Requirements

Mandatory Reporting

Since 2017, private sector employers with 250 or more employees are required to report annually on the average pay gap between male and female employees.[2]

The Companies Act 2006 requires certain companies to include certain DEI information in



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their strategic reports. Since April 1, 2022, the Financial Conduct Authority has published new and more extensive obligations for certain listed companies to provide standardized numerical data on the diversity of their boards and executive management by gender and ethnicity in their annual reporting statements.[3]

As the focus on ESG continues to increase, it's likely that mandatory reporting requirements will also increase.

Voluntary Reporting: Disability and Ethnicity

Even if not caught by mandatory reporting requirements, many employers are nonetheless choosing to voluntarily report on the diversity of their workforce, particularly in the areas of disability, ethnicity and gender.

This year, the U.K. government issued its ethnicity pay reporting guidance, noting that analyzing pay information "helps employers understand whether unjustifiable disparities exist between different ethnic groups and in turn, gives them an evidence base from which to develop an action plan."

The guidance also seeks to provide a consistent, methodological approach to ethnicity pay reporting, which can then lead to "meaningful action, while remaining proportionate and without adding undue burdens on business." [4]

Employers are awaiting a response to the U.K. government's consultation on the potential introduction of mandatory disability workforce reporting requirements, although many employers do voluntarily report on this, following the framework published by the Department for Work and Pensions in 2018.[5]

Potential Developments

The scope and breadth of reporting will likely continue to increase in the coming years, with organizations increasingly choosing to monitor aspects of diversity across their workforce not necessarily directly linked to "protected characteristics," [6] including employees' socioeconomic background and employees with caregiving responsibilities.

As more diverse characteristics are recognized across society, the scope of reporting will likely continue to increase.

Data Protection Law

When processing any personal data relating to employees, employers — as controllers — must first be able to demonstrate a lawful basis for collecting such data.

Depending on the context, lawful bases for the processing of DEI data would likely include (1) pursuing of legitimate interests, (2) relying on an individual employee's consent, and (3) complying with a legal obligation.

While employers that have mandatory reporting obligations will be able to demonstrate a duty to comply with legal obligations to collect certain data relating to employees' gender, employers that do not have mandatory reporting requirements or that wish to collect broader categories of DEI data — much of which will be classified as sensitive or special category data, such as data relating to ethnicity — will have to rely on an additional special condition for processing.

In the context of DEI data, the most applicable conditions would include (1) the substantial public interest on the basis of U.K. law or (2) the explicit consent of the employees.

Schedule 1 to the U.K. Data Protection Act 2018 sets out conditions for meeting the "substantial public interest" ground under Article 9(2)(g) of the U.K. General Data Protection Regulation.

Two conditions are noteworthy in the context of the collection of racial and ethnic data.

First is an "equality of opportunity or treatment" condition.

This is available where processing of personal data revealing racial or ethnic origin is necessary for the purposes of identifying or keeping under review the existence or absence of equality of opportunity or treatment between groups of people of different racial or ethnic origins, with a view to enabling such equality to be maintained or established.

The data must not be used for measures or decisions with respect to a particular individual or where there is a likelihood of substantial damage or distress to an individual. Individuals have a specific right to object to the collection of their information.

The second condition covers "racial and ethnic diversity at senior levels of organisations."

Organizations may collect personal data revealing racial or ethnic origin where it is part of a process of identifying suitable individuals to hold senior positions; is necessary for the purposes of promoting or maintaining diversity in the racial and ethnic origins of individuals holding such positions; and can reasonably be collected without the consent of the individual factoring in any risk that collecting such data may cause substantial damage or substantial distress to the individual.

The ethnicity pay reporting guidance acknowledges the importance of approaching the collection of employees' ethnicity data with "sensitivity and transparency," suggesting an employee opt-out option of answering questions around ethnicity data.

Organizations must prepare an appropriate policy document outlining the principles set out in the conditions and the measures taken to comply with those principles.

To rely on employees' explicit consent,[7] it must be a freely given, specific, informed and unambiguous indication of an employee's wishes.

According to the Information Commissioner's Office,[8] if an employee fears adverse consequences in their employment if they do not give consent, for example, it will not have been freely given.

If employee consent is relied on to process DEI data, consent needs to be sought for each specific use of the employee's data and employers should explain:

- What the data will be used for;

- That providing data is not mandatory or in any way a condition of their employment and there will be no adverse consequences if the employee chooses not to provide it;
- That employees can choose what categories of data they provide, e.g., include express "prefer not to say" options; and
- That employees can withdraw their consent at any time and explain how.

Other Data Protection and Privacy Requirements

Employers seeking to process DEI data must also notify employees why they are collecting the information, how it will be used and to whom it will be disclosed. This should be explained in the employer's privacy notice.

Employers should also carry out a data protection impact assessment when monitoring special category data, limit the use of information that identifies individual workers' identities only so far as necessary and keep such data in anonymized form where practicable.

Organizations must also adhere to their data retention requirements in respect of DEI data.

Practical Considerations: Maximizing Employee Participation

Communication Is Key

Any equality monitoring exercise will only be as effective as the data it receives.

To effectively monitor and improve workplace equality, employers need as complete a data set as possible.

Disclosing information about matters of diversity is, however, a sensitive issue, and employees are more likely to provide data if they understand why it is being collected, how it will be used and what steps the employer is taking to protect it.

The Equality and Human Rights Commission, or EHRC, recommends all employers put in place — and regularly review and update as necessary — an equality policy[9] and the Advisory, Conciliation and Arbitration Service, or Acas, has produced high-level guidance[10] for employers on this.

Ensuring that a policy is in place, and it is communicated to the workforce, preferably alongside specific training, helps employees understand the purpose behind the employer's request for information.

To drive employee participation and responsiveness, employers are advised to accompany any workforce monitoring request with broader, carefully drafted communications explaining its purpose and why it is so important.

It should also make clear that providing data is voluntary and choosing not to do so will not have a detrimental impact on their employment.

Framing the Questionnaire

What questions to include in an equality and diversity monitoring questionnaire should be carefully considered.

The EHRC has provided guidance on issues for organizations when asking for information about employees' protected characteristics,[11] and Acas has also produced a template monitoring questionnaire with example questions to include.

Employers should be careful to frame the questions considering the specific nature of the requests and the nature of their workforce to ensure questions capture as much information as possible, while recognizing that the terminology used to describe individual characteristics can vary and not all employees will identify in the same way.

Areas to focus on when drafting these questions include:

- ***Ethnicity:*** What terminology and ethnic categories should be used? U.K. employers can choose to use the categories of ethnic groups that are employed by the Office of National Statistics[12] in the census. However, ethnicity can, of course, mean something different depending on where the employee is based and so, if asking for data on a global basis, employers might, instead, choose to refer to the minority groups identified by, for example, the United Nations[13] to capture a wider set of ethnicities.
- ***Gender:*** Although gender pay gap reporting requirements only require reporting on the numbers of men and women, employers should be mindful to include the broader categories of gender recognized in society.
- ***Transgender Status:*** To effectively monitor how well an organization is recruiting and supporting its transgender and nonbinary employees, it could ask employees to confirm if they identify with the same gender as they were registered at birth.

Employees should be given the opportunity either not to respond to a particular question or, if applicable, to use their own terminology to describe their individual characteristics.

How Employers Can Lawfully Use This Data: Positive Action vs Positive Discrimination

Monitoring DEI data is of crucial importance for employers to understand and address inequalities.

However, in doing so employers must be careful not to cross the line from positive action, which is lawful in England and Wales, into unlawful positive discrimination.

This was the case in the widely reported Royal Air Force inquiry from June, which uncovered unlawful discrimination in their employment practices by implementing targets for the recruitment of females and candidates from ethnic minorities.[14]

The U.K. government issued supplementary guidance[15] for employers on positive action in the workplace earlier this year, providing practical examples of potentially lawful steps employers could take to reduce disadvantage, meet different needs and increase participation across the workforce, noting the differences between general positive action and positive action in the context of recruitment or promotion.

As a rule, employers should keep individual employees' DEI data, if provided, separate from any decision-making process, for example, in relation to recruitment, participation in sponsorship or mentoring initiatives, promotion or remuneration.

Ensuring data is only accessible to a very small number of employees within the organization — or, if appropriate, a third-party processor — helps to defend against any allegations of positive discrimination from disgruntled candidates or employees in the future.

Conclusion

DEI initiatives can and should be front of mind for all organizations to ensure that they can attract and retain the best talent, benefit from external investment, satisfy their mandatory reporting requirements and be able to reduce and, if necessary, defend allegations of discrimination.

U.K. data protection and privacy laws permit employers to collect and process DEI data in appropriate circumstances, but to get the most out of the data employers should think carefully about what data they need and why, provide open communications to employees to explain the rationale for collecting the data and how it will be used, be sensitive to how different individuals might identify and try to engage with employees drafting monitoring questionnaires.

Finally, employers must be mindful of the important distinction between positive action and positive discrimination when implementing any decisions impacting the workforce in response to a workforce DEI monitoring initiative.

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[1] <https://www.standard.co.uk/business/business-news/22-of-uk-employees-report-facing-discrimination-in-the-workplace-survey-b1099485.html>.

[2] Equality Act 2010 (Gender Pay Gap Information) Regulations, 2017.

[3] Financial Conduct Authority, 'Diversity and inclusion on company boards and executive management', April 2022, p.4, PS22/3: Diversity and inclusion on company boards and executive management (fca.org.uk).

[4] <https://www.gov.uk/government/publications/ethnicity-pay-reporting-guidance-for-employers/introduction-and-overview>.

[5] <https://www.gov.uk/government/publications/voluntary-reporting-on-disability-mental-health-and-wellbeing>.

[6] Ss. 5-12, Equality Act, 2010

[7] Article 9(2)(a) UK GDPR.

[8] <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/consent/when-is-consent-appropriate/>.

[9] EHRC, <https://www.equalityhumanrights.com/sites/default/files/employercode.pdf>, p. 269.

[10] <https://www.acas.org.uk/improving-equality-diversity-and-inclusion>.

[11] EHRC, <https://www.equalityhumanrights.com/sites/default/files/employercode.pdf>, Appendix 2.

[12] <https://www.ons.gov.uk/peoplepopulationandcommunity/culturalidentity/ethnicity/bulletins/ethnicgroupenglandandwales/census2021>.

[13] <https://www.un.org/en/fight-racism/vulnerable-groups/minorities>.

[14] For example: <https://www.bbc.com/news/uk-66060490>,

[15] <https://www.gov.uk/government/publications/positive-action-in-the-workplace-guidance-for-employers/positive-action-in-the-workplace>.