

ESG and DEI: Managing Competing Reporting Obligations in the U.S. and Internationally

By Laura A. Mitchell & Jean Kim

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President Trump's recent executive orders call for the elimination and, in some cases, requisite penalties for certain DEI initiatives and the data collection and reporting that accompanies them. In addition to raising questions about company culture, these orders may conflict with the mandates of the EU's Corporate Sustainability Reporting Directive (CSRD), creating compliance issues for global employers.



Transcript

INTRO

President Trump's recent executive orders call for the elimination and, in some cases, requisite penalties for certain DEI initiatives and the data collection and reporting that accompanies them. In addition to raising questions about company culture, these orders may conflict with the mandates of the EU's Corporate Sustainability Reporting Directive (CSRD), creating compliance issues for global employers.

On this episode of We get work®, we explain how cross-border employers should approach these opposing policies and what questions should guide their next steps.

Our hosts today are Laura Mitchell and Jean Kim, principals, respectively, in Jackson Lewis' Denver and Atlanta offices. Laura co-leads the firm's ESG group, and Jean focuses her practice on cross-border employment work.

Laura and Jean, the question on everyone's mind today is: how can I remain compliant with contrary policies across borders, and how does that impact my business?

CONTENT

Laura A. Mitchell

Principal, Denver

This is Laura Mitchell, and I am thrilled to be here today speaking with a new addition to our JL team, Jean Kim. Jean is a member of our International Group and sits in Atlanta. Welcome, Jean, to JL and to the We Get Work podcast series.

Jean Kim

Principal, Atlanta

Thanks, Laura. Nice to be here. Just to give a little background of myself, I'm Jean Kim, and I'm one of the principals with the International Employment Group here at Jackson Lewis. I regularly advise clients that have both U.S. and international operations. In other words, when a client crosses at least one country's border in relation to their workforce, I'm here for it.

So, in that vein, we've had questions pop up about what clients should be thinking about in the global space in relation to what you're about to talk about here and what we're going to discuss. I was hoping that we could share some thoughts on that point.

Mitchell

We're going to talk today about global reporting requirements for companies around ESG, diversity and pay transparency. The last time that I had a conversation about this was in December; it feels like a lifetime ago. However, I was speaking with your colleagues, Chris Anderson and Pieter Pecinovsky from our L & E Global Consortium. We knew we were going to come back and talk about this some more, but I don't think we knew we would be back this soon or have this much to talk about.

So, there's been a lot going on since December. In fact, there's been a lot happening in the last 30 days. I just want to recap what's going on in the U.S. before I kick it over to Jean to give us a synopsis of new updates from the global perspective. President Trump has issued a number of executive orders impacting all areas of workplace law, but a few have centered on diversity specifically.

We have, in particular, Executive Order 14173 'Ending Illegal Discrimination and Restoring Merit-Based Opportunity.' This executive order really has employers in the U.S. in a tailspin. There are specific requirements for federal contractors and implications for private employers. It's being touted by the administration as the most important federal civil rights measure in decades. It seeks to end 'illegal DEI discrimination.' It doesn't define what those terms are, so that's part of the tailspin that employers are dealing with. But it's really focused on rooting out employers and employer DEI programs that constitute illegal discrimination or provide preferences. But it goes hand in hand with this notion of diversity demographic data, analytics and reporting.

For companies that do business with the federal U.S. government, it means the end of affirmative action planning, reporting requirements in that space and even a forthcoming contract term that they are going to have to certify under the threat of False Claims Act action that they are not engaging in any unlawful DEI programs or discrimination.

Then, for private employers or those that don't do business with the federal government, the executive order involves heightened scrutiny and possible investigation by the Department of Justice into diversity and inclusion practices. So, that is the landscape that we're here dealing with in the U.S. We knew there was going to be some change when we talked in December, but I don't think that we appreciated the magnitude or the swiftness with which this came.

What are you all seeing internationally with respect to diversity initiatives and even some implications of what's going on here in the U.S.?

Kim

At this time, companies are mainly asking how the executive orders impact reporting obligations in the EU, which makes sense since the EU directives that you discussed on the previous podcast likely apply to a majority of clients with global operations.

While that's a great start, the questions we should start asking largely fall into three buckets. One with that question being the first bucket, more generally put, the first bucket is what is the EO's impact on the new regulatory environment for international reporting rules such as the EU's Corporate Sustainability Reporting Directive (CSRD)? The second bucket would be how international reporting rules, such as the EU's CSRD, impact U.S. obligations. Lastly, the third one would be DEI, in general, as a global company.

Mitchell

So, just to summarize, there is not really a legal implication yet for the global reporting requirements as implicated by this executive order if I'm understanding.

Kim

Correct. Strictly speaking, the anti-DEI EOs do not apply outside the U.S., but we should be recognizing that those same EOs may have an impact on a company's reporting requirements outside the U.S. and vice versa, and also a company's global DEI space, in general. When you're being told that your DEI programs and initiatives are illegal in one country but in other countries you operate in, you are subject to laws that essentially require you to have those DEI initiatives. You can high-level take the position that only in scope operations will report and comply, if applicable. You can't and shouldn't ignore what that means for your company's reputation, whether that's internally and externally, or how that is going to shape your company culture, the employee experience and so forth. Again, those are the questions we should be asking ourselves at this time.

Mitchell

That is consistent with what we've been talking about in the ESG space for a while now. This notion of values-based governance and organizations understanding who they are, what they stand for and how they are going to communicate that in the face of various different pressures from shareholders, employees and regulators.

So, it feels like that conversation now is just elevated. We are talking about this on steroids, and companies really need to decide what they are going to talk about and how they are going to talk about diversity. How are they going to reassure their employees that they are still an organization that has values, cultures and core beliefs and upholds the law while also not drawing the attention or the ire of the administration?

Do you think that this is a conversation that is happening globally as well?

Kim

Of course, companies have been having these types of discussions for a very long time and will most likely continue to do so. In my opinion, these EOs and international reporting or disclosure obligations don't and shouldn't change that as a fact. Instead, it should change how we talk about it and what direction the discussion goes in. When there is a push for enhanced DEI or ESG-related considerations, we're going to talk about them. When there's the opposite, we are still going to talk. We expect that organizations will need to navigate these conflicting requirements and figure out what to prioritize, what they're legally required and obligated to do and ultimately, figure out what they want to do as an organization.

Mitchell

Is this a discussion or a consideration that's happening globally as to where are a company's values and cultures, and what they're communicating to employees in the positions that they're taking publicly?

Kim

I do believe that it's a discussion that's happening in the global space. Not only is this a matter of addressing regulatory requirements, whether it's from a reporting standpoint or a disclosure standpoint, but like you said, it's a matter of how you're going to frame your internal culture and your company's reputation internally or externally. So, at that point, we need to start talking about how we comply with these non-U.S. requirements along with the "anti-DEI requirements" that are newly developing here in the U.S. while still maintaining what we as a company would be prioritizing whether that's your culture, your reputation, your PR matters and so forth.

Mitchell

One of the things that we talked about with Peter and Chris was the fact that globally, and the EU especially, are just pushing forward with these initiatives. We're not seeing a retraction or a pullback on these like we have seen in the U.S. over the last year or so. The schism between the two is going to become greater. So, I'm curious about the practical implications of that for global organizations. It may vary depending on, the point that you made before, whether you're a U.S.-based company with global operations or you're a global company with U.S. operations. How do you see organizations starting to think about their reporting requirements, and again, practically speaking, what are some tactics that they can employ to comply in both spaces?

Kim

I'm going to have to take us back to the three buckets, Laura, that I mentioned earlier. I believe we first need to look at it separately from each bucket's vantage point. Once we identify the overlap, take a position that aligns with the company's risk tolerance level. If you have a company culture that focuses on messaging from the top down or leads by example at headquarters, this may result in giving more autonomy to your U.S. entity or your non-U.S. entity to set forth certain initiatives in the DEI space. It could also result in finding a creative solution to maintain company initiatives by reframing them one way or another.

Mitchell

That makes a lot of sense. I know the EU's CSRD is probably the most notable or most well-known of these requirements, but there are other countries that have obligations as well. It's akin to how pay transparency has developed in the U.S. Each state has come out with its own laws that may be similar and may borrow some language from other states, but they really are an amalgamation and unique in their own jurisdiction. Organizations, just multi-state organizations, have had to decide whether to take a centralized approach to addressing pay transparency or to take it on a case-by-case, jurisdiction-by-jurisdiction basis.

What is the suggestion with respect to global requirements and reporting? Is it practical to take this piecemeal patchwork approach to it? Or do you really think that in the global space, a more unified, harmonized approach is the better way to go?

Kim

I'm usually a proponent of harmonizing employee relations and experience matters. That being said, that may be a more risk-tolerant approach for some companies. At the end of the day, you know what is more important to you as a company; you know how you've been operating. I'm not advising that all of a sudden, all the companies listening today that have been taking piecemeal approaches, country-by-country approaches, whatever that may be, to suddenly start taking a harmonized approach to this one issue. It's not something that's going to change overnight, and you know what works best for you. But if you are a company that harmonizes, for example, your employment practices, your policies, your trainings and so forth, that's something we may want to talk about.

Mitchell

That makes a lot of sense. Here, too, in the U.S., as we see more states come online with pay transparency requirements and as we see individual states respond to what we're seeing coming from the administration in this DEI space, it's going to have to be a company-by-company determination of what makes the most sense for them as an organization.

But I really do think that this harmonization of responses is going to be important because, at the end of the day, the organization does need to have a voice as to who they are. Whether that is a unified voice across borders or if it's a voice for the U.S. and a little more of a vocal and diverse voice across the border, it'll be important for them to understand what those risks are for either approach.

So, with that, what would you say would be the number one takeaway that you would want folks listening to us today to think about and to take back to their organizations?

Kim

Understanding your current DEI programs and initiatives and then carefully assessing the legality and impact of those practices going forward against local requirements is something that we need to prioritize. The EU reporting requirements are, of course, at the forefront of most minds, but I mean local requirements in a

broader sense than that. For example, in the UK, the government is proposing new diversity laws, which include mandatory ethnicity pay gap reporting on employers. If that becomes an obligation, when reporting on those, you'll likely need to show what the organization did to address any disparities or what you plan on doing to that extent. Arguably, that could fall under a DEI program that conflicts with the U.S.'s recent EOs.

Another thing to think about are your HR trainings. Anti-harassment or anti-sex harassment specifically are required in many jurisdictions outside the US. Those types of trainings are often categorized under an umbrella of DEI-related mandatory trainings for employees. U.S. companies also typically subject their non-U.S. employees to these types of trainings from a global standard, even though they're put together from a U.S. mindset. So, what happens when you stop offering those to comply with U.S. requirements? How will that impact your non-U.S. operations and compliance matters? Those are all things that we should be thinking about today coming off of this podcast for sure.

Mitchell

That is such sage advice. It's a good reminder that at the end of the day, U.S. employers are still bound by the non-discrimination, non-harassment requirements of Title VII and our other anti-non-discrimination laws. So, that still should be our guiding principle. It should have always been our guiding principle, but it still is our guiding principle today.

You recommended taking a measured and thoughtful approach. I know a lot of organizations were really blindsided by these executive orders here in the U.S. There was this rush to respond, to ensure that we weren't putting our reputation at risk and that we weren't kind of ending up on a watch list for the government. But quick knee-jerk reactions may ultimately come back and create more risk than, as you mentioned, having a really comprehensive, thoughtful approach of how we're going to address all of these in a compliant way to ensure that we aren't running afoul of any of our obligations, whether they be in the U.S. or globally.

With that, thank you so much, Jean, for joining me today. This was another great conversation. As I ended our last podcast, I'm sure we will be talking about this again in the future, probably in the near future. I look forward to chatting with you again.

OUTRO

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