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Inclusion and Diversity in Latin America

An overview of I&D trends and legal developments in the region

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Foreword

The importance of Inclusion and Diversity (I&D) for businesses has evolved significantly in the wake of social movements. While #MeToo has swept across much of the globe, Latin America's '[Ni Una Menos](#)' spotlights femicide and violence against women. The advancing conversation around I&D globally is giving rise to new and strengthened regulation while bringing about increased scrutiny of organizational culture by shareholders and stakeholders.

However, as we found in the second installment of our [Mind the Gap](#) report, organizations across the globe are making slow progress to address I&D goals. Our research of 900 employment leaders confirms that many organizations are less far along the path than they hoped; continuing to work on long-held priorities such as raising awareness of I&D, recruitment and retention of diverse talent and increasing the diversity of senior management (which in many organizations remains predominantly white and male).

In this report, we take a closer look at Latin America's I&D landscape through the eyes of our local experts. While legal frameworks aimed at addressing inequality in the workplace have been slow to evolve, organizations in LATAM are getting ahead of lawmakers, implementing more evolved I&D strategies as they seek to respond to stakeholder and shareholder demand and to attract the next generation of workers. In turn, governments in LATAM are responding to the need to update their frameworks and combat inequality with more specific measures such as hiring quotas and other provisions to support underrepresented groups.

To help employers stay ahead, this report sets out an overview of I&D trends and challenges in the region, including the top regulatory developments and trends across seven jurisdictions.

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* Trench Rossi Watanabe and Baker McKenzie have executed a strategic cooperation agreement for consulting on foreign law.

The I&D landscape in Latin America

Find out how organizations are embracing I&D and how global I&D trends are playing out across the region.

Argentina



The landscape:

The Argentine National Constitution provides the equality principle and expressly states that all residents are eligible for employment without any condition other than suitability. Moreover, labor contract law specifically prohibits discrimination among employees on the basis of gender, race, nationality, religion, political or union opinion or age. Similarly, general anti-discrimination law mandates the cessation of all discriminatory acts and practices and provides for a claim of damages in case of violation, taking into consideration factors such as the economic position, social condition and physical characteristics of the offended party. Based on the above, historically, employers have always been bound by non-discrimination obligations, but we are now seeing increasing compliance particularly in light of recent regulations on I&D. Companies are currently demonstrating a commitment to I&D by implementing relevant policies and training programs.



Global I&D trends and challenges in Argentina:

- 1. Positive discrimination action:** Positive discrimination actions include quotas for underrepresented groups (i.e., gender identity and disability) in the public sector. Currently, there is no mandatory quota for underrepresented groups in the private sector, although specific provisions on this may be included in the applicable collective bargaining agreement. Additionally, anti-discrimination actions include benefits from a tax and social security perspective for the hiring of underrepresented groups. Regulations are constantly evolving in this context and trends currently applicable to the public sector may eventually become applicable to the private sector.

- 2. Gender pay reporting legislation:** There are no regulations on gender pay reporting.
- 3. Pay equity legislation:** The Argentine National Constitution provides the principle of equal pay for equal work, although labor contract law specifically allows different treatment among employees when it is based on common good, greater efficiency, industriousness or commitment to the tasks.
- 4. Workplace harassment litigation:** Although not widespread, workplace harassment litigation is becoming more common. Employees would typically allege constructive dismissal and claim payment of severance compensation, plus fines and damages.
- 5. I&D training programs:** I&D training programs, together with I&D policies, are the most common positive actions by companies to address inclusion and diversity matters.

“ I&D undoubtedly occupies an important space in our collective agenda and, although there is a long way to go, recent regulations for the public sector in Argentina shed more light on I&D and put things in motion. We are seeing constant steps in the right direction.



Alberto Gonzales-Torres
Partner, Buenos Aires, Argentina



Brazil



The landscape:

In the past, I&D initiatives were seen as a mechanism to ensure that an organization had an inclusive space or even as a way to prevent liabilities based on an adverse and discriminatory culture. However, in time, companies started to notice that actively supporting I&D practices directly impacted the business, the workforce and their brands. Now, I&D is becoming a structural component for companies in Brazil, although we are a little behind compared to other jurisdictions.

Following the natural course of this increasing I&D reality, we are now seeing the population clamoring for companies that actively support I&D practices, either from a customer, investor or even workforce perspective. With special programs focused on closing or mitigating I&D gaps, companies are challenging themselves to take actions to ensure higher numbers of individuals from an underrepresented group are engaged within the organization and in leadership positions. This movement from organizations and the general population highlights the significant gap in Brazil's I&D legislation and government I&D initiatives, which have unfortunately been left behind the times.



Global I&D trends and challenges in Brazil:

- 1. Positive discrimination action - Privacy legislation:** Positive discrimination now requires a careful review to ensure that companies processing I&D data are complying with Brazil's new Data Privacy Protection Law. Legal and compliance teams will need to track any guidance or case law arising from the new rules.
- 2. Gender pay reporting legislation:** Is not yet a requirement in Brazil. There have been a few proposed bills in Congress, suggesting companies should be obliged to implement such reporting, but none of these are as yet in the final stage of becoming effective law.

- 3. Pay equity legislation:** Under Brazil's Labor Code, all employees working for the same employer and in the same location, providing services with the same amount of work and equal productivity, must receive the same salary. This provision follows the rationale of the Federal Constitution, which also prohibits differences in wages based on sex and other characteristics.
- 4. Workplace harassment litigation:** Is somewhat common in the region. We are now seeing an increase in collective and class actions related to I&D matters filed by labor authorities, the Labor District Attorney and even representative bodies and NGOs. In particular, there has been an increase in collective disputes, which often trigger more severe consequences and involvement by the media.
- 5. I&D training programs:** Are not required by any local legislation, but have become more frequently implemented by companies as a way to imbibe the I&D culture, ensure proper impact of internal I&D initiatives and increase the employer brand as an inclusive and diverse company.

As I&D continues to be a key priority for businesses and their stakeholders, companies that invest in I&D strategies will be better placed to improve their position within the market. Further, as I&D gains prominence on ESG agendas, companies with sound I&D practices and a strong I&D culture will have a greater chance of increasing value and promoting growth.

“ Inclusion is the lesser understood component of I&D, and our data clearly demonstrates that there is further to go to ensure all employees can thrive at work. Ongoing talent retention issues and challenges establishing a 'speak up' culture suggest that employees from underrepresented groups don't yet feel that they truly belong in many organizations. Inclusion is a key aspect to ending talent turnover and creating respectful workplaces everywhere.



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Chile



The landscape:

Not so long ago, I&D had no real importance in Chile. There were only isolated examples, usually from non-national or multinational companies where I&D was promoted. It was not widespread, nor were there many regulations in this regard - only certain rules mainly prohibiting discrimination and harassment.

In recent years, companies have begun to pay more attention to I&D principles, although no generalized government regulation or initiative has been put in place. However, it is becoming increasingly relevant to the point where companies are adopting I&D as part of their corporate values and a new generation of talent is deliberately seeking to work for companies with established I&D principles.



Global I&D trends and challenges in Chile:

- 1. Positive discrimination action:** There are a few rules regarding positive discrimination. In Chile, for employers with more than 100 employees, at least 1% of the workforce must be comprised of persons with a disability. However, it is important to be cautious about acts of positive discrimination not mandated by law, because even positive action could be considered arbitrary discrimination in certain circumstances.
- 2. Gender pay reporting legislation:** Does not exist in Chile.
- 3. Pay equity legislation:** The Chilean labor code provides for equal pay between men and women, working in the same position, unless due to reasons related to capability, qualifications, suitability, responsibility, or productivity. Currently, there is a bill in Congress that seeks to ensure that equal pay is real and effective, without exceptions.

- 4. Workplace harassment litigation:** We foresee these types of cases increasing. Previously, as, it was not regulated, it was uncommon to see this kind of lawsuit. Under Chile's current labor code, there is a specific ground for dismissal for workplace harassers.
- 5. I&D training is not a requirement in Chile:** However, we are seeing more companies rolling these initiatives out to raise awareness of I&D among employees, especially in relation to the prohibition of conduct constituting harassment and discrimination.

“ Promoting I&D within an organization and in our communities is certainly a challenge. It requires constantly raising awareness on the benefits that I&D brings to the table in terms of innovation, competitiveness, productivity and wellbeing. We are all called upon to make a social impact, even more so with the current demands of stakeholders and society in general.



Andrés Valdés
Partner, Santiago, Chile

Colombia



The landscape:

Discrimination on the basis of gender identity, sexual orientation, disability, age, race, religion, social status and nationality, currently affects a significant proportion of the population in Colombia. In the workplace, discrimination and lack of diversity are caused by numerous factors ranging from difficult access to education by some communities, impacting their competitiveness in the employment market, to unconscious biases and negative perception by individuals in charge of recruitment and hiring.

Fortunately, Colombian companies have not been oblivious to this situation. Today, I&D in the workplace is an intangible asset tremendously valued not only by employees and shareholders, but also by clients, investors, vendors and supply chain participants. It has likewise become a crucial due diligence component in mergers and acquisitions. A diverse and inclusive workplace can boost productivity and strongly reflects a company's values.



Global I&D trends and challenges in Colombia:

- 1. Positive discrimination action:** Employers are allowed to implement positive discrimination subject to specific requirements established by the Constitutional Court. However, employers must take care to comply with privacy regulations in the collection and treatment of sensitive personal data of candidates, employees and involved third parties, lest their actions trigger sanctions and reputational risk. In the private sector, there have been some initiatives to promote the inclusion of women on boards of directors and in managing positions. These initiatives are being supported by the national government through measures such as the "Women Equality Pact", a chapter in the National Development Plan. The "Women Equality Pact" includes objectives such as (i) allowing women to participate in an equal labor market, (ii) a higher representation of women in decision-making positions (in public and private sector), and (iii) the reduction of discrimination based on gender.

- 2. Gender pay reporting legislation:** There is no current legislation or bills of law on gender pay reporting obligations. However, employers must maintain a gender pay registry that must be available for inspection by the authorities. Non-compliance could trigger fines from the Ministry of Labor and reputational risks.

- 3. Pay equity legislation:** Colombia follows the principle of equal pay for work of equal value. While the Supreme Court has considered experience and seniority as the basis for treating employees differently, academic background on the other hand should not be in itself a ground for differential treatment among employees except when it creates an advantage in the efficiency, level of responsibility or other similar situations.

Claims relating to 'equal job, equal pay' are relatively common in Colombia. However, such cases are not often grounded on discrimination based on gender, ethnicity, nationality, etc. but, rather, on the fact that the claimant argues that they held an equal or similar position than another employee who had a better remuneration scheme. In these cases, the Supreme Court of Justice has laid the burden of proof on the claimant, while the employer must comply with very specific requirements to show the application of the 'equal job, equal pay' principle.

- 4. Workplace harassment litigation:** We are seeing an uptick in workplace harassment litigation. These claims are subject to a special litigation procedure, which is more expedited than an ordinary proceeding.

- 5. I&D training programs:** While not legally required, many companies have opted to train their workforce on: (i) appropriate use of language; (ii) unconscious bias; (iii) sexual harassment at the workplace; (iv) diverse recruitment, and (v) better practices for inclusion in the workplace, among others.

“ The new corporate leadership focus definitively goes well beyond profit and EBITDA. Corporations must now be sustainable, inclusive, and diverse to increase their true and perceived value. New studies demonstrate that a diverse workforce increases ROI and revenue while improving risk management and innovation. Further, a diverse, equitable, and inclusive workforce greatly impacts the personal and professional growth of employees. Additionally, it increases knowledge and reduces skills gaps, having a strong influence on retention, good branding, and corporate culture.



Tatiana Garces
Partner, Bogota, Colombia



Mexico



The landscape:

In Mexico, as in Brazil, I&D initiatives used to be seen more in the light of avoiding liabilities for potential discrimination. In recent years, perception of I&D has shifted to a more proactive stance, with companies having witnessed its positive impact on their business and workforce. However, with increasing awareness comes a rise in discrimination complaints, forcing companies to pay more attention to their I&D policies. While I&D has become a structural component in many companies in Mexico, we are still relatively behind compared to other jurisdictions. However, the pendency of several bills related to I&D is a welcome development towards formally integrating I&D principles into Mexican law and society.



Global I&D trends and challenges in Mexico:

- 1. Positive discrimination action:** The Federal Law to Prevent and Eliminate Discrimination allows employers to implement positive discrimination actions to protect underrepresented groups.
- 2. Gender pay reporting legislation:** Does not exist in Mexico.
- 3. Pay equity legislation:** Under Mexican labor law, all employees performing the same work under the same conditions (i.e., work shift, position) and efficiency, must receive the same salary.

- 4. Workplace harassment litigation:** There are special procedural provisions for claims based on workplace harassment, which reduce litigation time and expedite resolution. We have seen few cases on workplace harassment but we foresee these type of cases to increase.
- 5. I&D training programs:** Are not required by any local legislation, but have become more frequently implemented by companies as a way to embed the I&D culture, ensure proper impact of internal I&D initiatives and position the employer brand as an inclusive and diverse company.

“Inclusion is an indispensable element for obtaining the benefits of diversity. Having an inclusive organization ensures that all individuals are equally included, and their opinions are listened to and evaluated with the same consideration. Cultural actions enforced by the appropriate legal framework are necessary to accomplish the above. Long term orientation and inclusive values enable organizations to thrive and achieve sustained growth.”



Maria Rosario Lombera-Gonzalez
Partner, Mexico City, Mexico



Peru



The landscape:

Since the early 2000's, there has been a general push to protect marginalized groups from discrimination in the workplace. In 2018, a growing awareness of gender discrimination and violence towards women led to the issuance of new regulations on equal pay and the prevention of sexual harassment at work. These two regulations are important milestones due to the establishment of specific measures to prevent or eliminate gender disparities at work, unlike their previous counterparts.

During the pandemic, the focus of labor regulation was on health and safety. In this context, the Mental Health Act was approved and a regulation to protect the elderly from discrimination was introduced. Despite these important legal advances, the discussion of equally relevant issues such as gender identity, LGBTQ+ marriage, racial discrimination and its impact on employment, to name just a few, is still pending.

Companies in Peru therefore play an important part in championing equality in society, by ensuring that the rights of their personnel are protected in the workplace, thus inspiring the same treatment across their communities.



Global I&D trends and challenges in Peru:

- 1. Positive discrimination action:** Companies have a mandatory employment quota of people with disabilities (i.e., disability quota). Consequently, employers are required to implement reasonable accommodations where necessary to make sure that employees with disabilities can render their services safely.

Employers are allowed to implement positive discrimination as a way to guarantee the rights of employees who belong to vulnerable groups. Currently, companies in sectors with predominantly male employees have programs that incentivize the recruitment of women as a way to fight occupational segregation. In order to implement this kind of program, it is key to ensure that I&D data is collected in compliance with Peruvian legislation.

- 2. Gender pay reporting legislation:** There is currently no gender pay reporting legislation in force in Peru. There have been a few proposed bills in Congress but none have reached the final stage.
- 3. Pay equity legislation:** Peru enacted the Equal Pay Act, which establishes special obligations for employers in order to guarantee employees' rights to equal pay for work of equal value. Peruvian law permits employers to provide different salaries to personnel who provide equally valued services, provided there is an objective reason.
- 4. Trends in harassment litigation:** Since the implementation of the regulation on sexual harassment at work in 2018, there has been an increase in claims of sexual harassment in the workplace, which has forced employers to deal with these kind of cases on a more regular basis. Employers who fail to investigate these claims can be sued for damages and severance and/or fined by the Administrative Labor Authority, as well as facing reputational risk.
- 5. I&D training programs:** Employers are required to train their personnel on the prevention of sexual harassment in the workplace, including specialized training on how to investigate sexual harassment claims at work, for HR personnel and Committees against sexual harassment at work (which are internal organizations that, pursuant to Peruvian law, each employer entity with at least 20 employees must implement). In the agricultural sector, employers are required to train their personnel on human rights and gender perspective.

“ One of the main goals of companies today must be to guarantee safe spaces free of all types of violence for all their employees. To achieve this goal, it is key to invest in training and awareness programs and campaigns that allow employees to identify, challenge, report, and resolve instances of harassment.



Monica Pizarro
Partner, Lima, Peru



Venezuela



The landscape:

I&D has been on the agenda of companies in Venezuela for several years now. Similar to our neighboring jurisdictions, we are seeing the substantial role of I&D values not just in raising the profile of a business among its stakeholders and consumers but also in attracting valuable talent. With organizations realizing that adopting an inclusive and diverse culture is fast becoming imperative for overall business welfare, the government has to catch up to the times in creating regulation to support the I&D movement.



Global I&D trends and challenges in Venezuela:

- 1. Positive discrimination action:** Discriminatory practices are contrary to the principles of Venezuelan labor law. Any distinction, exclusion, preference or restriction in access to work and in working conditions, based on reasons of race, gender, age, marital status, union membership, religion, political views, nationality, disabilities or social origin, and other conditions that undermine equality before the law or are incompatible with the legal system are prohibited. Acts in violation of these principles are considered null and void and may be punishable under the law. From an employment perspective, it is unlawful to include clauses that contravene the aforementioned provisions in job applications and in individual employment agreements.

- 2. Gender pay reporting legislation:** Does not exist yet in Venezuela.
- 3. Pay equity legislation:** Under Venezuelan labor law, equal salary must be paid for work of equal value, i.e., work that is performed in the same job, work hours and conditions of efficiency.

The foregoing does not exclude the possibility of social premiums being granted for seniority, assiduity, family responsibilities, economy of raw materials and other similar circumstances, provided that these premiums are applied generally for all workers who are in similar conditions.

- 4. Workplace harassment litigation:** While there has been an increase in internal complaints, workplace harassment litigation before the courts is not common.
- 5. I&D training programs:** Are not required by any local legislation, but have become more frequently implemented by companies as a way to promote the I&D culture, ensure proper impact of internal I&D initiatives and increase the employer brand as an inclusive and diverse company.

“ If diversity is a key ingredient for building a successful workforce, inclusion is an essential element for allowing such workforce to unleash their true potential and accomplish outstanding results. Companies are thus well advised to maintain truly inclusive and diverse organizations.



Carlos Felce
Partner, Caracas, Venezuela

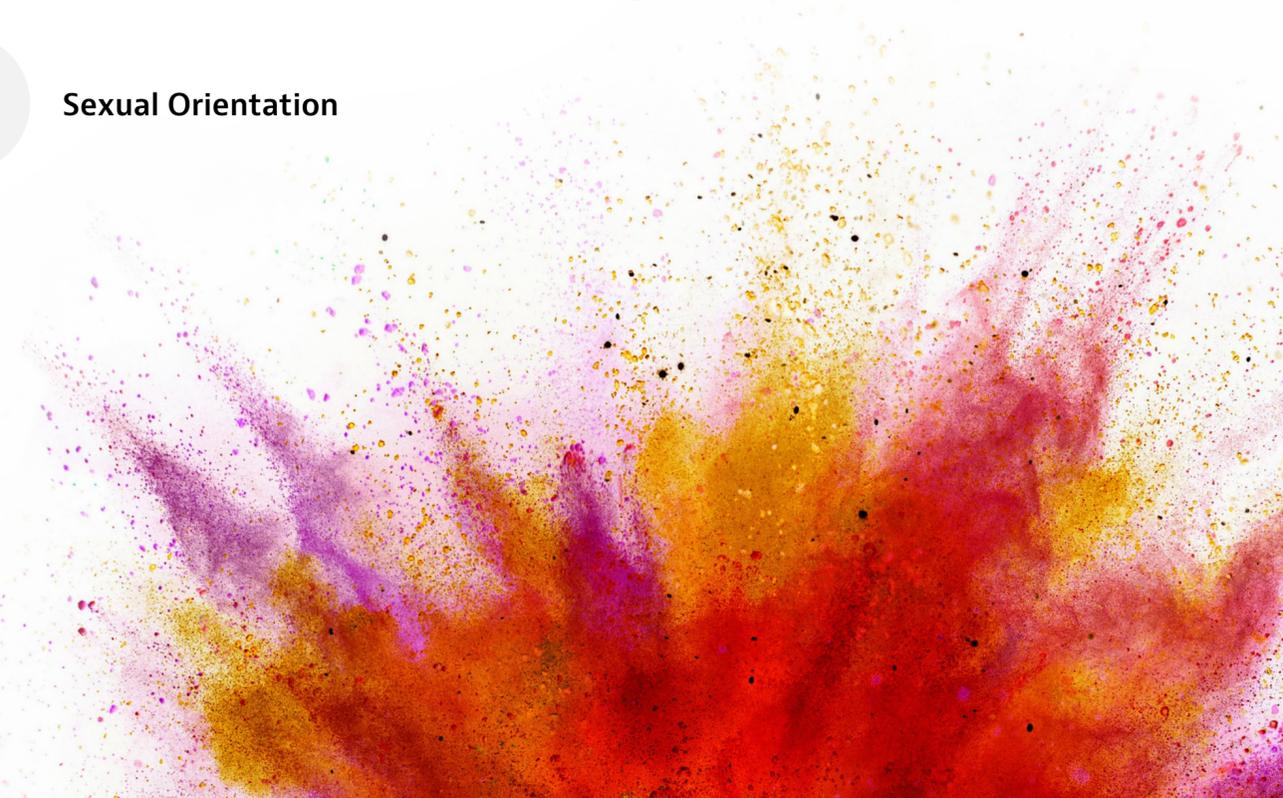
I&D laws at a glance

Characteristics protected from discrimination across Latin America

Across Latin America, the following personal characteristics are generally protected from discrimination in the workplace.



-  Age
-  Nationality / Race / Ethnicity
-  Religion
-  Gender
-  Sexual Orientation
-  Mental Health
-  Marital Status
-  Pregnancy
-  Disability





Workplace Discrimination: Risk & Compliance

This heat map demonstrates the relative risks of non-compliance with worker-related discrimination regulations across the LATAM region using an overall risk rating of 1 to 5, with 5 being the highest risk, taking into account:



Financial risk - exposure to financial penalties or other sanctions



Litigation risk - likelihood of claims being brought



Reputational risk - likelihood of media attention and/or stakeholder and consumer scrutiny.





On the horizon

Here are the top regulatory developments and trends in I&D that employers need to watch out for in the region.

Argentina

- Recent regulations from 2020 onwards provided a 1% quota on hiring transgender people in the public sector. Considering the constant movement in regulations regarding I&D, it is reasonable to expect similar trends in the near future for the private sector.
- Argentina recently ratified the International Labor Organization's Violence and Harassment Convention, 2019 (C190), which provides for the adoption of an inclusive and gender-responsive approach to prevent violence and harassment in the workplace.
- Locally, I&D are highly sensitive matters, which occupy an important space in our society's agenda. Companies observing good I&D practices are generally well-received by the public, including consumers and commercial partners, thus benefiting the company's operation as a whole.

Brazil

- The enactment of the **Brazilian Data Privacy Protection Law** exposes companies to sanctions and reputational risks for non-compliance. Consequently, a review of I&D practices will soon be an immediate priority.
- **ESG practices and initiatives** are climbing up the corporate agenda as investors and clients pay more attention to sustainability. We are seeing some movements in the financial sector limiting IPOs and entering of companies unless there is concrete evidence of diverse leadership and high elements of ESG.
- **Remote work:** In terms of the future of the workforce, there are studies showing that remote work and social distancing have harshly affected the LGBTI+ community and women. Finding a balance between remote work arrangements, positive discrimination and I&D initiatives will be challenging for companies, with a continuing pandemic and a new generation of young people seeking to integrate into the workforce.

Chile

- **New Constitution:** Chile is currently in the process of preparing a new Constitution in which I&D will probably have significant importance. It will be important to monitor developments on this and the implications it may have in the field of I&D.
- **Board diversity:** Chile's newly elected president proposed to submit a bill seeking employee participation on the companies' board of directors and gender parity.
- **Hiring quotas:** There is a new bill that seeks to increase hiring quotas of persons with disabilities in large companies, from 1% to 4%.

Colombia

- **Positive discrimination actions:** Our Constitutional Court and Ministry of Labor have recently issued certain guidelines reiterating the requirements that must be met by private employers to be able to implement positive discrimination towards specific groups (women, LGBTI+, AfroColombian, etc.). Consequently, employers need to review their I&D policies and affirmative actions to ensure they comply with these requirements.
- **Multidisciplinary compliance around I&D policies:** Implementing complex and robust I&D policies requires employers to make sure that they are compliant with all applicable laws, especially those concerning data privacy, workplace harassment, internal investigations, whistleblowing protections and speak-up regulations, among others. Thus, employers must have a multidisciplinary assessment over the implementation of these kinds of policies.
- **ESG:** Colombian stakeholders are giving increasing importance to non-financial factors as part of their analysis of a company's valuation. I&D is one of the most important sustainable development goals on which companies are focusing. We expect this trend to increase in our country.



Mexico

- As mentioned above, we foresee an increase in workplace harassment litigation.
- There are no other anticipated developments in I&D regulation in Mexico at the time of writing.

Peru

In relation to I&D, the following bills are being discussed:

- **Gender Identity Act:** This proposal includes a labor section where, among other matters, the right of transgender employees to use their social name at work is recognized.
- **Law against racism:** This bill expressly authorizes positive action as a way to fight structural discrimination on grounds of race, in all spheres.
- **Update of sexual harassment legislation:** Given that Peru has approved ILO Convention No. 190 on 2022, it is likely that current legislation in this matter will be reviewed to align with the requirements included in this international treaty.

Venezuela

- The National Assembly has not yet announced any potential legislation in the field of I&D. However, companies should continue to monitor developments in this space in case new legislation on I&D is proposed.





Conclusion

At Baker McKenzie, we have vast experience helping companies examine how effective their strategies are in addressing inequality, while helping put a plan in place to create a level playing field that works for both employers and employees, protecting reputations, maintaining compliance throughout jurisdictions and litigating when necessary. For more information click [here](#).

To find out more about how your organization can strengthen its I&D strategies, read our [Mind the Gap](#) report, which gives key insights, based on an in-depth survey of 900 employment leaders on global I&D trends and issues.

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