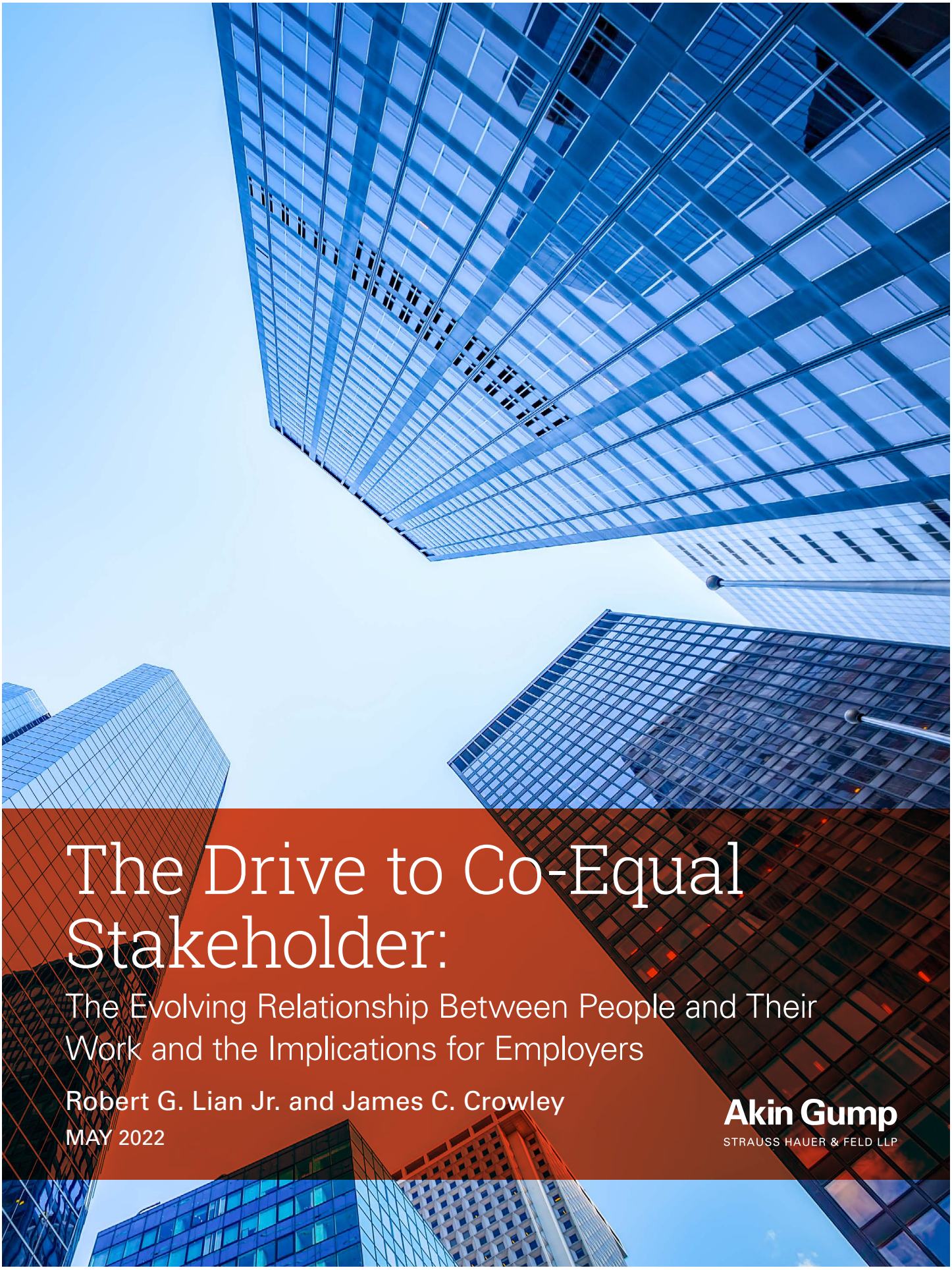

The Drive to Co-Equal Stakeholder:

The Evolving Relationship Between People and Their Work and the Implications for Employers

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Introduction

A massive shift is underway in the relationship between workers and companies. Fueled in recent years by the COVID-19 pandemic and tight job market, the changes reflect not just evolving sensibilities of how employers treat employees, but about the basic nature and assumptions around work itself, including where, when and how it is performed. Blackrock CEO Larry Fink recently observed in his 2022 letter to CEOs:

> [n]o relationship has been changed more by the pandemic than the one between employers and employees. The quit rate in the US and the UK is at historic highs. And in the US, we are seeing some of the highest wage growth in decades.[1]

The workplace is on the front line in American life where emerging cultural or social forces can become binding legal rules, as legislatures and regulators enact laws that can quickly convert policy preferences into legal mandates on employers. From transparency enabled by social media and evolving legal requirements, to the effects of technology and automation, these and other forces have upended workplace norms in an unprecedented way. They are combining to drive fundamental change in the employment relationship, helping propel a transformation from a straightforward economic bargain in which labor is exchanged for compensation, to one that has a surrounding social construct that, while not yet clearly defined, is nonetheless growing roots through emerging legal requirements. All of these developments are coming against the backdrop of intense pressure on companies around their environmental, social and governance (ESG) commitments and the workplace-related undertakings arising within that framework.

We explore here the legal underpinnings of the employer-employee relationship in the United States from its origins to its modern conception today. We identify 10 areas where social and economic forces, technology and the law are combining in important, yet unpredictable ways to effect significant changes to the employment relationship.

Mr. Lian and Mr. Crowley are lawyers in the Washington, D.C. office of Akin Gump Strauss Hauer & Feld LLP. The views expressed herein are their own and do not reflect the views or position of the firm or of any client the firm represents. The discussion herein is informational in nature and should not be considered legal advice.

10 Areas Driving Change in the Employment Relationship

1. **Employee Expectations Around Ownership and Workplace Democracy.** Unprecedented employee turn-over and growing importance of human capital to organizations, combined with greater visibility into company compensation structures, are forcing employers and their companies to reevaluate how to deliver equity and other forms of ownership to employees throughout the organization. The injection of social and cultural issues into the dialogue in the workplace, coupled with various social media avenues for sharing views, invite workers to seek a greater voice in the terms, conditions and day-to-day affairs in their workplaces.

2. **The Chasm Between Varied Worker Arrangements and Existing Legal Structures.** Millions of workers in the United States no longer fit neatly into a rigid employee-or-independent-contractor dichotomy. Until policy-makers address this disconnect in a comprehensive way, the risk to companies and workers of court decisions and regulatory actions that upend their expectations and business relationships will only grow.

3. **Diversity, Equity and Inclusion as a Guiding Imperative.** Rhetorical or symbolic commitment to diversity, equity and inclusion initiatives is being rapidly displaced by stakeholder expectations and demands for demonstrable and measurable progress toward the achievement of a more diverse and inclusive workplace and leadership structure.

4. **Heightened Expectations of Transparency.** The ability of employers to maintain privacy of their affairs is rapidly disappearing. Legislatures and regulatory agencies are placing a growing number of legal restrictions on an employer's ability to maintain and enforce confidentiality, non-disclosure and other protections. At the same time, policymakers are placing greater restrictions on the ability of employers to access information about applicants and employees.

5. **The Critical Role of Ethical Conduct by Corporate Leaders.** With increased visibility into the actions of companies and their leaders through social media and job review websites like Glassdoor and Blind, the need for ethical conduct by leaders has never been more important. Leaders' behavior that could once be excused or overlooked can quickly "go viral" and be picked up by leading news services. Companies and their boards can take important steps to create conditions that help facilitate ethical leadership by top executives.

6. **Efforts to Influence Workplace Issues Through Capital Structure.** Companies and their investors should anticipate increased scrutiny and growing levels of sophistication by stakeholders seeking to force changes to workplace practices using leverage through a company's ownership structure.

7. **Leadership on Cultural and Political Issues.** From the murder of George Floyd by a Minneapolis police officer, to the law around abortion, to natural disasters and war, the line between what are purely workplace concerns and broader societal issues is increasingly blurring, forcing leaders to walk a tightrope between speaking authentically to issues of employee and broader public concern and turning the workplace into a public square that risks alienating people with differing views.

8. **Reinvigoration of Organized Labor and the Role of Labor Unions.** It is too early to know whether organized labor will succeed in reversing its decades-long decline, but recent, high-profile organizing successes, increasingly positive societal attitudes toward unions and significant government policy changes encouraging organizing all foretell at least a short-term resurgence in unionization and union bargaining clout.

9. **Workplace Safety as a Key Priority.** COVID-19 and employer efforts to combat the disease in working environments raised the national consciousness about safety in the workplace, especially among businesses that did not otherwise consider themselves in hazardous industries. That renewed focus is likely to remain.

10. **The Workplace Legal Mosaic.** Legislatures and agencies at all levels of government in recent years have passed laws broadening employee workplace rights and protections that could potentially change an operating practice for an entire company. Employers should make sure they have a reliable mechanism in place to track and monitor developments affecting the business.

Employers face significant challenges not just engaging and retaining quality workers, but in creating the sorts of policies, processes and incentives that will allow the business to thrive in an increasingly competitive environment. Every company, major equity holder and business leader must carefully consider these issues and design an appropriate strategy with an eye on the rapidly evolving nature of the work relationship itself.

The Evolving Employer - Employee Relationship

The Role of the At-Will Employment Doctrine

Whether we realize it or not, at the economic core, we are a nation of day laborers. Under the so-called "at-will" doctrine, employers offer a job at a specified level of pay, with certain terms and conditions, and employees accept that offer by performing the work, giving rise to the employer's obligation to compensate that employee. With few limitations, employers can change an employee's role, pay or other aspects of employment, or terminate that employee altogether, with little or no notice.[2] Workers have a parallel right: also with few limitations, they can decline to accept employer changes to their job, and they can quit without notice.

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The employment relationship in the United States was not always this way. Labor in early modern America was once considered a domestic relation, even familial in nature. An employee or apprentice was considered a servant in the eyes of the law, but employers also had the responsibility to provide necessities like food, clothing, lodging and medical care for their employees. Employees owed their employer obedience and faithfulness.[3]

Changes in the traditional relationship became necessary to meet the needs of the emerging market economy in the United States.[4] Labor was soon governed by contracts in which employees agreed to work for a period—often a month or year—for wages paid to them at the end of their term.[5] If an employee quit before the end of the term, however, the worker often had little recourse to recover unpaid wages.[6]

Courts eventually developed the at-will rule to fill the void where an employment relationship was formed but no definite duration had been stated.[7] Employees were only paid wages if they performed work. However, it had become difficult to determine whether employees who broke their contracts were owed wages at all. Some courts insisted that every contract of employment implied a notice period for its termination, the duration of which an employee was entitled to wages for work performed.[8] But the at-will rule provided a different solution that eventually took hold: a hiring in exchange for wages without any fixed duration is presumed to be terminable at-will, although the worker is free to prove that a contract requires a term of employment.[9] Some courts identified freedom of contract as the policy reason for the at-will rule,[10] while others applied contract principles of consideration and mutuality to conclude that an employee was not entitled to job security—only wages earned—in the case of indefinite employment.[11]

The at-will rule has experienced considerable erosion over the years. Statutory minimum wage and mandated benefits have replaced individual contracts as the price floors in the labor market. Once considered a criminal conspiracy to distort the labor market, unionization became an inherent right of employment under the National Labor Relations Act (NLRA), Railway Labor Act (RLA) and some state laws. The Occupational Safety and Health Act (OSHA) has given employees the right to work in an environment free from recognized safety hazards. Anti-discrimination legislation and court decisions provide protections against adverse job actions on the basis of race, religion, sex, sexual orientation, national origin, age, disability and, in some states, additional characteristics like political affiliation and marital status.

Changing Work Structures

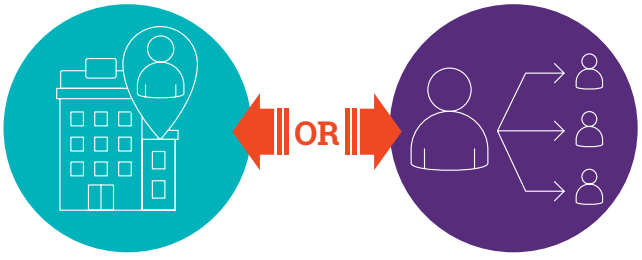
Like the employment relationship, the structure of work itself has changed. Labor was once primarily performed by workers employed at a single business. But the labor that a company needs to achieve its mission is increasingly outsourced to other entities. This phenomenon reflects the growing tendency of firms to contract out their labor needs, rather than directly employ workers to make products or deliver services. "Fissuring" is the now-prevalent term in academic circles for the devolution of jobs away from a single integrated business to multiple different employers, often along functional specialties or particular core competencies.[12] Jobs that were once available through lead businesses increasingly reside with separate employers under more competitive (or, depending on one's vantage point, less favorable) conditions.[13] Increasingly, outside firms supply specialized services or components, temporary employment agencies supply labor and franchisees take over all daily operations subject to standards set by the lead business. These changing work structures do not always harmonize with existing legal frameworks, including worker classification and joint employment liability.

Worker Classification

The U.S. economy is abounding with work arrangements that do not fit neatly into the employee versus independent contractor dichotomy. The flexibility of these arrangements is a benefit to both workers and companies, but the lack of a clear fit creates a significant ongoing legal and financial threat to all participants. The Pew Research Center found that 16 percent of adults in the United States (59 million people) in August 2021 earned at least a portion of their income from the so-called "gig economy"—the online market of laborers who provide freelance work driving for ride-hailing platform companies, making deliveries and running errands.[14]

Because most workplace legal protections are premised on a traditional employer-employee relationship, there has been a range of efforts to extend firms' legal responsibility for workers in response to changing work structures. Chief among these efforts is the expansion of the definitions of "employee" and "employer." Regulators and legislatures have been reconsidering classifications for workers who do not fit neatly into traditional categories under state and federal labor laws. Sometimes these efforts may require legislators to rethink legal tests for employment, including, for example, what it means to control the manner and means by which work is performed. In the case of student athletes and graduate students, for example, that effort might involve stretching traditional employment principles, such as hiring and compensation, to cover college recruitment and scholarships.[15]

An increasingly complex mosaic of state laws affecting the classification of such workers has the potential to change the entire operating practices of companies or industries. Some states, including California and Massachusetts, for example, have adopted a test for determining whether a worker is an employee or independent contractor known as the ABC test.[16] Under the test, an individual is classified as an employee if the individual is free from control and direction, performs a service outside the usual course of the hiring entity's business and is customarily engaged in an independently established trade of the same nature as the service performed. This test makes finding an independent contracting relationship more difficult than some other commonly used legal standards. Even other commonly used legal tests present clear misclassification risks. For example, the "economic realities" test under the Fair Labor Standards Act (FLSA) includes several factors, including whether the worker's work is an integral part of the employer's business. Regulators in some jurisdictions have applied that and other tests to create a presumption of



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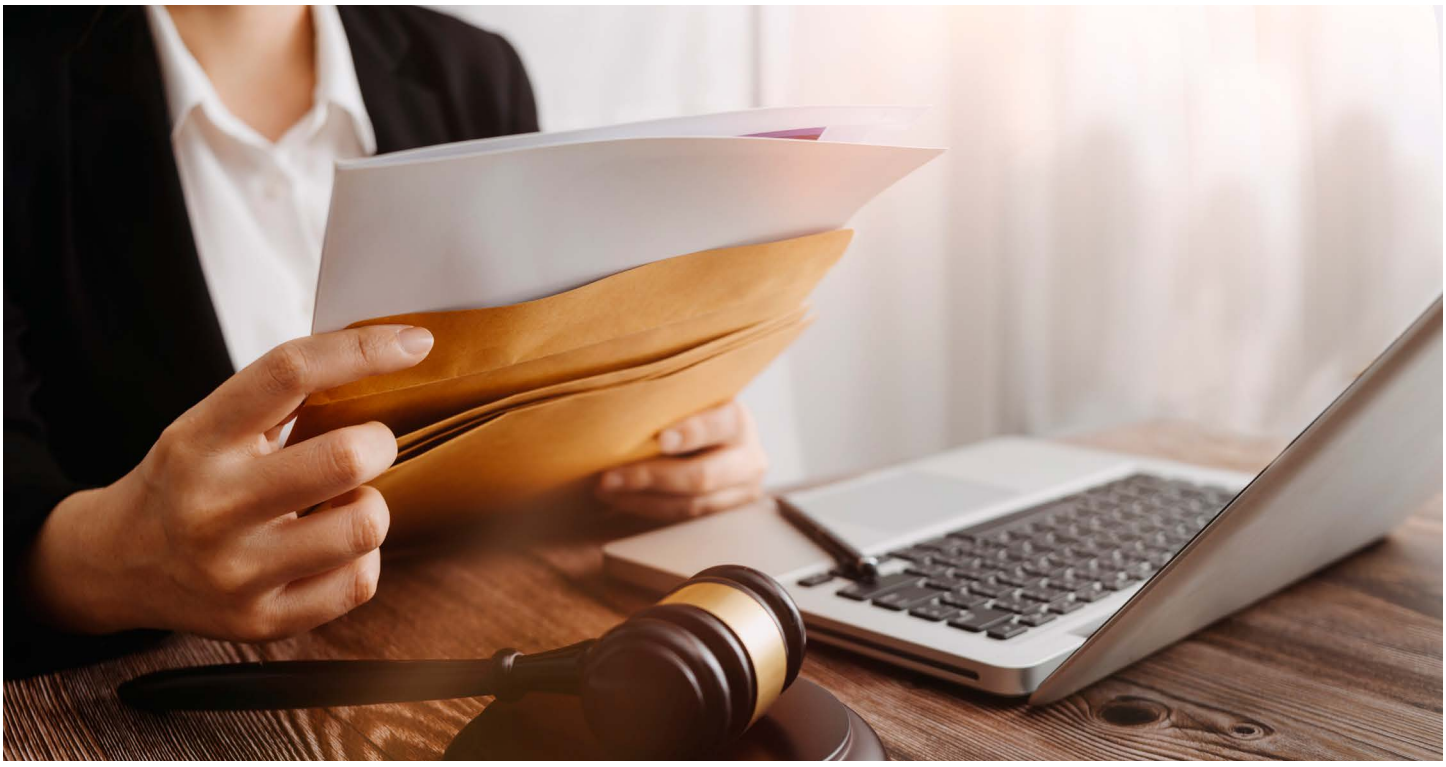
employment for workers and adopt a de facto ABC test.[17] In addition to an increasingly complex legal patchwork, regulatory flip-flops on how businesses and individuals should evaluate the classification question that have occurred with changing presidential administrations, leave companies and workers without clear guidance on how to structure their affairs. The Obama administration, for example, issued Administrator's Interpretation No. 2015-1 applying a strict reading of the FLSA's economic realities test aimed principally at the gig economy.[18] The Trump administration withdrew that interpretation in 2017[19] and replaced it with a new regulation offering an interpretation of that same test designed to protect the independent contractor classification of gig workers, which the Biden administration then withdrew not long after taking office.[20] A federal district court has since invalidated the withdrawal and reinstated the regulation from the Trump administration for the time being.[21] The Biden administration appealed that ruling, adding uncertainty to the future of the regulation.

The practical consequences to individual workers and businesses are significant. Many businesses and even some whole industries—like gig transportation and product delivery—are built around workers classified as independent contractors. Companies and workers structure their relationships around the particular treatment afforded to independent contractor relationships under applicable tax codes and other laws.[22]

Joint and Several Liability

Regulators are also increasingly looking for ways to expand joint and several liability when there is more than one employer on the scene or different businesses decide important aspects of the employment relationship. These regulators, as well as workers' advocates, seek to extend the reach of lead firms' responsibility for workers in their supply chain—whether private equity firms and hedge funds undertaking restructurings of their portfolio companies, franchisors imposing rules on their franchisees or businesses outsourcing labor to contractors.

Legal doctrines, such as joint employment, single employment, and alter-ego employment, offer courts and agencies the opportunity to dispense with limited liability in a labor law context whenever they determine that a shareholder or parent corporation "controls" a particular corporate entity. Recently, there have been efforts to impose liability upon businesses for merely having the right to control another employer's workforce indirectly.[23] While some courts and regulators have called such broad liability standards into question,[24] workers' advocates continue to call into question whether businesses in industries with longstanding contracting and franchising practices would be liable for the decisions of franchisees or contractors over whom they had little, if any, actual control.



The Emerging Social Construct Around Employment

A tight labor market has repositioned workers throughout the economy to demand more from businesses and employers. As of March 2022, the Bureau of Labor Statistics estimated 11.3 million job openings in the United States, while a record number of workers quit their jobs in what has become popularly coined "the Great Resignation."[25] This labor shortage, and the measures businesses must take to address it, have significant implications for company bottom lines and stock markets. Labor costs comprise a significant portion of corporate balance sheets—more than 54 percent of expenses for companies listed on the S&P 500, or as much as four times other line items.[26] With higher demand for labor, workers have begun to assert renewed bargaining power. Many workers are demanding enhanced benefits, new work structures and greater stake in their employer's business.

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Changes in the Nature of Work

For many workers, the nature of the workday fundamentally changed during the COVID-19 pandemic. Some workers flexed remote work schedules at different times of the day and week. These workers tended to hold white-collar jobs.

Over 70 percent of employees in jobs that required at least a bachelor's degree were able to telework.[27] Other workers were unable to telework, and needed to adjust to safety measures that disrupted their workday. These jobs tended to be blue-collar, with 30 percent of jobs that required only a high school diploma capable of being performed remotely.[28]

In large numbers, workers who were forced to telework during the pandemic are now demanding the option to continue working remotely. In September 2021, 45 percent of full-time employees in the United States were working partly or fully remotely.[29] As of October 2021, nine in 10 of those remote workers want to maintain remote work to some degree.[30] Meanwhile, many workers who were unable to telework during the pandemic are leaving blue-collar jobs to train for or accept office jobs that allow remote work.[31] As a result, many employers will continue to confront the need to build trust in a remote work environment and train employees on how to communicate effectively through online platforms. Other employers will continue to face the pressure of a scarce labor market for blue-collar jobs, particularly those requiring high-skilled labor. While some of the recent developments may be the temporary result of unique and transitory forces stemming from a tight labor market, disrupted supply chains and other factors associated with the pandemic, many will be more durable.

Evolving Legal Rights: Policy Preferences Become Employer Mandates

The workplace is often the first, and typically the most prominent, venue in American society where social and cultural changes find an expression in legal requirements. Responding to pressure from interest groups or other movements, legislatures and regulatory bodies can effectuate rapid and often broad-based change in practices by passing laws requiring (or prohibiting) practices by businesses with respect to applicants and employees.[32] Moreover, changes in the law in just a few jurisdictions can reverberate across the labor force as workers develop new sensibilities of rights, like-minded regulators or legislators implement similar laws in their own jurisdictions, or employers find it impossible or impractical to change practices in just one jurisdiction. In this respect, and as the following examples illustrate, legislation both responds to emerging demands for rights and helps shape and propel such demands.

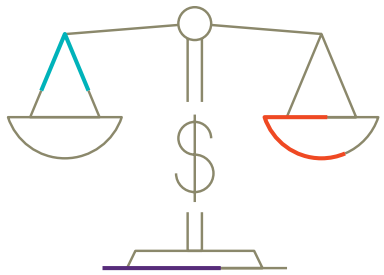
- **Expansion of anti-discrimination protections**. Some state legislatures have expanded the coverage of their anti-discrimination laws to prohibit workplace discrimination on characteristics not previously protected, such as sexual orientation,[33] gender identity,[34] bathroom and facility usage,[35] height and weight,[36] reproductive health decisions,[37] family members' genetic tests,[38] veteran status,[39] work authorization status,[40] voluntary emergency responder status,[41] public assistance status,[42] expunged or sealed convictions,[43] crime victim status,[44] use of a service animal,[45] status as a smoker or non-smoker,[46] language accent[47] and hair and grooming.[48] Many of these measures preceded or coincided with Bostock v. Clayton County, in which the Supreme Court held that discrimination against gay and transgender people is unlawful discrimination under Title VII of the Civil Rights Act of 1964.[49]

- **Salary history limitations and pay transparency**. State legislatures have proposed or enacted laws requiring companies to post salary ranges on jobs and prohibiting companies from asking about job candidates' salary history.[50] Several state and local governments have also proposed[51] or enacted[52] laws requiring employers to disclose salary ranges during the hiring process.

- **Limitations on restrictive covenants**. Many states have imposed stricter regulation of restrictive covenants, such as prohibiting noncompete covenants with employees under certain salary thresholds,[53] prohibiting noncompete covenants with hourly wage employees,[54] limiting the permissible duration of restrictive covenants[55] and prohibiting workplace policies that prohibit employment with other entities during an employee's employment.[56] At the federal level, a proposed bill in Congress would prohibit noncompete covenants in employment agreements.[57] While that bill has floundered, President Biden made limiting noncompete agreements a priority in his presidential campaign and signed an executive order encouraging the Federal Trade Commission (FTC) to curtail the use of noncompete clauses in employment agreements.[58] In November 2021, the FTC issued a draft strategic plan with an enforcement agenda that includes greater focus on workers.[59] As part of that plan, in December 2021, the FTC and the Department of Justice Antitrust Division held a two-day workshop "explor[ing] recent developments at the intersection of antitrust and labor, as well as implications for efforts to protect and empower workers through competition enforcement and rulemaking."[60] Among the agency goals that FTC Chair Lina Khan outlined at the workshop was scrutiny of noncompete agreements through the use of the FTC's rulemaking and enforcement authority.[61] Whether such rules would be promulgated and survive challenge has yet to be seen.

- **Restrictions on mandatory pre-dispute arbitration agreements**. The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, enacted on March 3, 2022, prohibits employers from requiring employees to arbitrate claims involving sexual harassment or assault, and voids mandatory arbitration clauses in existing contracts.[62] Some states have sought even broader restrictions. For example, in 2020, California enacted a law banning employers from requiring employees, as a condition of employment, to

sign an arbitration agreement.[63] The 9th Circuit upheld the California law, holding that it did not conflict with the Federal Arbitration Act because it was focused on conduct occurring prior to the existence of an arbitration agreement and did not invalidate voluntary agreements.[64]



- **Restrictions on non-disclosure agreements**. Both California and Washington state have recently passed laws prohibiting confidentiality provisions in settlement agreements for civil actions and administrative complaints including allegations of sexual assault, sexual harassment, or workplace harassment or discrimination based on sex.[65] Both laws also prohibit employers from requiring non-disparagement agreements that ban employees from disclosing information about sexual harassment or other related unlawful acts in the workplace as a condition of receiving a promotion, bonus or continued employment.[66]
- **Schedule predictability**. Some state and local governments have enacted laws requiring employers to give new employees good faith estimates of their work schedules, notice of schedule changes, protections against retaliation for employee schedule requests, limitations on additional hours and premium pay for scheduling changes.[67]
- **Lay-off and termination protection**. A few state and local governments have enacted laws prohibiting employers in certain industries from firing or laying off workers, or reducing their hours, without just cause or legitimate economic reasons—replacing the traditional at-will rule.[68]
- **Expanded Leave Rights:** A number of states and localities have passed laws mandating paid leave and similar rights. Maryland and the District of Columbia[69], for example, have passed laws expanding paid leave rights for employees, while in neighboring Virginia, the legislature passed a law allowing (but not requiring) employers to purchase insurance policies to replace income loss for eligible employees due to certain health or family situations.[70]
- **Sectoral labor standards**. In 2021, the California legislature introduced a bill that would require representatives of fast food workers and employers to negotiate and enact labor standards in the industry through the state's administrative code—effectively mandating industrywide collective bargaining through administrative procedure.[71] The New York legislature introduced a similar bill aimed at gig workers.[72]
- **Broadening notions of basic workplace rights**. The General Counsel of the National Labor Relations Board (NLRB) has focused the agency's enforcement efforts on policing both union and nonunion employers in their maintenance of work rules and policies that may chill employees from engaging in protected activity under the NLRA.[73] To be protected by the NLRA, employees usually must act in "concert." What rises to the level of concerted activity is sometimes disputed, but, at a minimum, it must impact employees' collective interests in the terms and conditions of their employment. A change in precedent could broaden the scope of protected activity to cover a variety of societal issues, such as off-duty political activities and protests—not just working conditions. In addition, even nonunionized companies may face challenges at the NLRB if they have confidentiality policies that require employees to refrain from discussing salary structures, organizational charts, employer business, financial data and private information. These challenges may have implications for employers responding to union organizing efforts, where the scope of employers' protected speech in the workplace is increasingly being called into question.[74]

Expectations of Ethical Leadership

In the wake of the #MeToo movement, a number of recent studies have shown a strong correlation between ethical lapses or misconduct by corporate leaders and meaningful financial damage to business. Misconduct can result in drastic changes to an organization from lawsuits to shareholder demands and even union organizing. For example, a shareholder lawsuit alleging that the CEO of Activision and other leadership hid the fact that the California Department of Fair Employment and Housing and the Equal Employment Opportunity Commission

(EEOC) were investigating workplace harassment allegations resulted in the sale of the company.[75] A federal district court eventually approved an $18 million settlement between Activision and the EEOC, but not before the Communications Workers of America (CWA) petitioned to intervene and object to the settlement.[76] Two male board members at Activision have since been replaced by women, and a workplace responsibility committee was formed to review the company's policies against harassment and discrimination.[77] In the meantime, the CWA petitioned the NLRB to hold a union election with some Activision workers.[78] Around the same time, the CWA filed a complaint with the Securities and Exchange Commission (SEC), alleging inaccurate and misleading disclosures in connection with the sale of the company.[79]

Ethical lapses can also hurt companies' bottom lines, wholly apart from exposure to damages and liability that may arise in claims from the misconduct itself.[80] The impact on the victim can be devastating, as can the effects on the reputation of the company and its culture, not to mention the career of individuals engaged in the misconduct. Increasingly, there is a premium on executive leadership, general counsels, human resource executives and boards of directors setting the highest standards for ethical conduct by company leaders, and to implement and rigorously enforce policies.[81]

Worker Bargaining Power

With the pandemic-tightened labor market, workers are leveraging their enhanced bargaining power with demands for higher pay, benefits and even many non-monetary incentives. Recognizing their enhanced bargaining power, many workers have negotiated enhanced terms of employment or shopped around for competing employers with the most attractive benefits. In January 2022, nearly 3 million workers quit their jobs or laterally moved to a different employer.[82] While inflation grew 7 percent in December 2021 from the year earlier, average hourly earnings have increased by 4.8 percent in the same time.[83] Nearly one quarter of private-sector businesses, employing 54 million workers, increased wages and salaries, paid wage premiums or paid bonuses during the COVID-19 pandemic.[84] Many workers are also demanding non-monetary incentives, such as high-quality work and advancement opportunities, rather than just financial rewards.

Other workers who have remained in their jobs are engaging in concerted activity at higher rates and even joining labor unions. Unionized workers at Nabisco, John Deere, Kellogg and Sysco were among those who struck last year to get better deals, while Major League Baseball experienced its first work stoppage since 1994 with the 2021-2022 lockout. In a 2021 survey, about half of tech workers said they are interested in joining a union.[85] For the first time, some warehouse workers at Amazon have voted in favor of unionization.[86] At Starbucks, Workers United, an affiliate of the Service Employees International Union, has mounted a nationwide organizing campaign, holding union elections at numerous individual Starbucks stores in multiple states.[87]

In 2021, over half of S&P 500 companies disclosed the racial makeup of their boards, compared to only a quarter in 2020.

In 2020, more than two-thirds of S&P 500 companies instituted new diversity initiatives, with more companies developing initiatives in 2021.

Worker Pressure for Stakeholder Status

Changing sensibilities have led some workers to see themselves as full-fledged stakeholders in their employer's business, as opposed to simply factors of production. Worker demands on corporations are reshaping the once prevailing view that efficient capital markets alone promote shareholder value and encourage investment. Workers' advocates and commentators have called for the corporate form to be refitted with a new purpose that requires consideration of all the stakeholders in the business—shareholders, employees, customers, suppliers, regulators and communities.[88]

Those calls have produced a growing chasm between worker expectations about their legal rights and what the law actually provides, especially at the federal level where the sharp political divide in the country and thin legislative majorities will limit the possibility for significant changes in the law.

Expectations of Transparency

For all of the amazing benefits it provides society, digital technology makes it hard for businesses to create a reliable shroud of confidentiality around workplace issues and conditions. Emails, text messages, slide decks and other data sources enable important information to be stored, retrieved and transmitted in neat electronic packages. But that same format makes it easier for that information to be leaked, hacked, stolen, transmitted to the wrong recipient, accessed without permission or otherwise shared against a company's intentions. Wikileaks, for example, still hosts 30,287 documents and over 173,000 emails from a 2014 cyber hack of Sony Pictures Entertainment, all readily accessible and searchable by anyone with an internet connection.[89] As professors Erik Brynjolfsson and Andrew McAfee observed in their book, *The Second Machine Age: Work, Progress, and Prosperity in a Time of Brilliant Technologies*:

> [t]here's a genuine tension between our ability to know more and our ability to prevent others from knowing about us. When information was mostly analog and local, the laws of physics created an automatic zone of privacy.[90]

Legal forces also erode the ability of organizations to maintain secrecy and help create an expectation of transparency with regard to workplace issues and conditions. Several states have enacted pay transparency laws requiring employers to provide pay scales to external applicants.[91] Others prohibit confidentiality provisions related to certain workplace conduct or complaints,[92] and federal law now prohibits private (and otherwise confidential) compulsory arbitration of certain types of discrimination and harassment claims.[93] OSHA is undertaking a rulemaking that would require electronic filing and public availability of workplace injury and illness records.[94] Employers also can face challenges maintaining confidentiality of documents they produce in litigation, as some courts are becoming more guarded in the confidentiality provisions they will permit.[95]

Rising almost in tandem with limits on businesses' ability to maintain confidentiality are legal restrictions on monitoring employees. As an example, many states restrict employers' ability to ask employees for passwords to social media accounts,[96] to collect or store biometric information,[97] and, more recently, to limit the circumstance in which employers can monitor employee use of employer electronic systems.[98] Courts have long held that the NLRA gives employees the right to communicate with one another about their terms and conditions of employment.[99] The NLRB, at times,

has sought to extend that right by curbing confidentiality requirements in workplace investigations,[100] separation agreements,[101] email and social media use,[102] and other employer prerogatives.[103] Job review websites like Blind[104] and Glassdoor[105] provide the ability of employees to share details about their workplaces anonymously with the world, further undercutting the ability of employers to separate the private from the public and heightening expectations for transparency among employees and other stakeholders.

Diversity and Inclusion

Following the death of George Floyd in 2020, protests over police brutality against Black people prompted a renewed focus on diversity in corporate America. Over half of S&P 500 companies voluntarily disclosed the racial makeup of their boards,[106] and more than two-thirds of S&P 500 companies instituted new diversity initiatives, with more companies developing initiatives in 2021.[107] Most of the diversity initiatives seek through various means to increase the percentage of minority employees in the workforce, particularly at the highest levels of management. Many initiatives also include commitments to achieve specific representation goals for minorities and women at various levels of the company within specified timetables.

Institutional investors and other third party stakeholders also are bringing their influence to bear by pressuring companies to be more transparent about the composition of their workforce. In his 2022 letter on the firm's 2022 Proxy Voting Agenda, State Street Global Advisors' CEO warned that voting action will be taken against responsible directors if:

- Companies in the S&P 500 and FTSE 100 do not have a person of color on their board.
- Companies in the S&P 500 and FTSE 100 do not disclose the racial and ethnic diversity of their boards.
- Companies in the S&P 500 do not disclose their EEO-1 reports.[108]

As of July 2021, Goldman Sachs will no longer take a company public without two diverse board members, one of whom must be a woman.[109] BlackRock reserves the right to vote against the nominating or governance committee of company boards that, in its judgment, have made "insufficient progress" addressing diversity.[110]

Regulators are increasingly involved as well. In August 2021, the SEC approved Nasdaq's Board Diversity Rule, mandating at least two diverse board members (or at least an explanation for not meeting the quota) of all companies listed on the exchange. Several states now require disclosure of board diversity for publicly-held companies in their jurisdictions,[111] and a few states mandate board diversity.[112]

Some businesses that implemented wide-ranging diversity initiatives in 2020 and 2021 are now facing increased government and shareholder scrutiny over whether there was follow-through on publicly professed commitments to diversity and inclusion. Not long after receiving a shareholder proposal from the New York State Common Retirement Fund calling for an independent audit of the company's workforce, Amazon publicly announced that it is conducting an audit to evaluate any disparate racial impacts resulting from the company's policies, programs and practices.[113]

But diversity efforts must comply with Title VII and other federal, state and local anti-discrimination laws. Without taking these laws into account, well-intentioned efforts to promote diversity may expose an employer to liability for reverse discrimination. Lawful affirmative action plans can permit (and/or require) employers to give special attention to persons in protected groups when making an employment decision, but typically are permissible only for government contractors. Employers remain at risk of claims when they implement diversity initiatives that select diverse candidates to move forward in the selection process to the exclusion of others.[114]

Political and Social Issues

As with diversity initiatives, many stakeholders, including workers, are pressuring their organizations to take stances on important political and social issues. While not traditionally considered protected employee activity, some government agencies are starting to apply labor laws broadly to cover employees' political advocacy over issues with an arguable nexus to the workplace.[115] Public pressure and stakeholder demands have at least temporarily transformed many global corporations into political actors capable of disconnecting countries, states, organizations and individuals from

the global economy. Following the Russian invasion of Ukraine in February 2022, workers demanded that major social media platforms demonetize Russian media and alter algorithms to de-prioritize results from official Russian media.[116]

Calls for sanctions on Russia quickly escalated into demands for a boycott in finance, automotive, consumer, technology and hospitality industries—reversing three decades of investment in Russia by foreign businesses after the Soviet Union broke apart in 1991.[117] Disney experienced its own set of challenges recently following a high-profile backlash for public comments on Florida's Parental Rights in Education bill.[118]

In response to a Texas law that bars abortion after about six weeks of pregnancy, dozens of employers signed a statement that said, "restricting access to comprehensive reproductive care, including abortion, threatens the health, independence, and economic stability of our workers and customers."[119] Some companies have gone further and announced that they will help employees travel to obtain abortions where their own states prohibit them.[120] Sen. Marco Rubio has responded to these reports by introducing the "No Tax Breaks for Radical Corporate Activism Act," which would prohibit employers from deducting expenses related to employee travel costs to obtain abortions or for certain care for transgender youth.[121] In 2017, North Carolina repealed a law restricting restroom use for transgender people, hoping to bring back businesses and sports leagues that boycotted the state at the urging of their employees.[122] These and other efforts are likely to continue as further examples mount of businesses taking concrete action in response to worker advocacy.

Demands of Shareholders and Investors

Shareholders and activist investors also expect to be heard on a range of workplace issues outside traditional financial metrics like profit margins or return on equity for shareholders. The Interfaith Center on Corporate Responsibility, a coalition of over 300 faith- and values-based institutional investors, filed nearly 250 shareholder proposals on a range of ESG issues, including wages and working conditions, for inclusion in company proxy statements.[123] Investor Carl Icahn launched a proxy fight against McDonald's to stop doing business with pork suppliers that use gestation stalls, and announced that he would nominate candidates to Kroger's board of directors to address the so-called "unconscionable wage gap" between its CEO and average employee.[124] Shareholders at Citigroup, Wells Fargo, Goldman Sachs, JPMorgan Chase, Bank of America and Dow, Inc. proposed mandating racial equity audits in proxy statements.[125] Shareholders at Tractor Supply Company asked that the company's board of directors report on whether the company prioritizes financial performance over wages and inequality.[126] Shareholders at Goldman Sachs have urged the bank to abandon mandatory arbitration as a remedy for worker complaints.[127]

Kroger, Chipotle, McDonald's, Caterpillar and other companies are tying executive pay to ESG goals as more investors, regulators and activists scrutinize corporate behavior.[128] These efforts coincide with the SEC's recent announcement that it is seeking public comment on proposed rules for companies to report to investors how executive pay stacks up against ESG statistics.[129]

Such demands may have important implications for benefits plans subject to the Employee Retirement Income Security Act (ERISA). In 2020, the Department of Labor finalized a rule requiring ERISA plan fiduciaries to select investments solely on the plan's financial risks and returns and the interests of plan participants and beneficiaries.[130] But on May 20, 2021, President Biden issued an executive order directing the Secretary of Labor to "consider suspending, revising, or rescinding any rules from the prior administration that would have barred investment firms from considering environmental, social and governance factors . . . in their investment decisions related to workers' pensions."[131] In response, on October 14, 2021, the Department of Labor proposed a regulation rescinding the Trump administration rule and acknowledging that ESG could be considered a factor that an ERISA fiduciary prudently determines to have a material effect on risk or return in light of the plan's investment objectives.[132] Some analysts are questioning whether the proposed rule, if adopted, could require fiduciaries to consider ESG factors when evaluating funds for ERISA plans.

Labor Unions and Non-Governmental Organizations

Union membership in the private sector has declined from 31 percent in 1973 to 6.1 percent in 2021.[133] In some industries, the decline has been precipitous, with a 32 percent downtick in mining, 18 percent in newspaper publishing and 20 percent in warehousing since 1979.[134] Meanwhile, proposed pro-union legislation has thus far languished in Congress and appears unlikely to gain traction in the near term.[135] But concerted activity in the workplace is back on the rise—whether employee demands related to working conditions or political activism. Strikes disrupted many workplaces as the COVID-19 pandemic settled in. Attitudes toward unions have changed as well. Over 68 percent of Americans approved of unions in 2021, up from 48 percent in 2009.[136]

In certain respects, traditional labor unions have not kept up. Few unions have been able to translate rising enthusiasm for the labor movement into pro-union votes at the NLRB. For example, the groundswell of pro-union votes at one Amazon warehouse in Staten Island has not yet been replicated at other warehouses.[137] Even where unionization prevailed, workers favored a non-traditional union founded by two former Amazon workers and rejected brassbound union halls, instead harnessing personal relationships with co-workers to expand the union's support. But like any successful organizing campaign, the union's endurance will depend more on gains in collective bargaining than vote tallies at the NLRB.

In other ways, unions are shifting attention to categories of workers never considered within the ambit of labor law. The law may not be keeping up, however. Unions have filed charges at the NLRB in hope of opening student athletes to collective bargaining. But union efforts to organize gig workers have stopped short—no doubt because the NLRB has not asserted jurisdiction over the gig economy. That has not dampened unions from pushing state laws designed to encourage collective bargaining,[138] urging government agencies to initiate antitrust investigations into gig companies[139] or appealing directly to the NLRB to loosen its test for "employee" status.[140]

Nor have unions been discouraged by old precedents excluding certain workers from federal labor law. Several unions, like the United Autoworkers, have formed arms to organize white-collar workers in the private sector, such as lawyers, nurses and tech workers. Having organized much of the adjunct faculty population at private colleges and universities, some unions are angling for tenured and tenure-track faculty as well. Long considered outside the scope of the NLRA, unions are seeking to drum up interest through pegging so-called "stagnating" faculty salary rates and reduced discretion with the proliferation of administrative positions and a shift in spending priorities away from teaching and research.[141]

The labor movement has long recognized that large employers have a number of points of financial, legal, reputational and other vulnerability that unions can exploit to apply leverage on a company. In one often-cited quote, former AFL-CIO President Richard Trumka described that such multifaceted union pressure strategies "swarm the target employer from every angle, great and small, with an eye toward inflicting upon the employer the death of a thousand

> Multifaceted union pressure strategies "swarm the target employer from every angle, great and small, with an eye toward inflicting upon the employer the death of a thousand cuts rather than a single blow."

cuts rather than a single blow."[142] The goal is "is to raise the stakes economically and politically… so that it is no longer in [the company's] interest to deny you justice. . . ."[143] "[T]actics may include . . . litigation, political appeals, requests that regulatory agencies investigate and pursue employer violations of state or federal law, and negative publicity campaigns aimed at reducing the employer's good will with employees, investors or the general public."[144]

Organized labor has often leaned on a company's ownership structure as a source of leverage to influence policies affecting workers.[145] Union and public employee pension dollars provide labor with the financial resources to gain a voice with company owners. Former AFL-CIO President Trumka conveyed much the same message in describing the investment strategy of the union's investment trust corporation:

> The labor movement's message is more powerful today than ever and labor's capital is an important tool in our toolbox. The AFL-CIO branded investment vehicles provide pension plans with powerful opportunities to pool investment dollars and promote good corporate governance.[146]

Some pension funds go a step further, mandating as a condition of investment that asset managers of infrastructure funds agree to "responsible contractor policies" ostensibly designed to set minimum labor standards and to establish "neutrality" in union organizing. Under these policies, asset managers (like private equity or hedge funds) agree to require that contractors working on projects associated with the infrastructure investment meet certain minimum requirements and labor conditions that can be subject to varying levels of evaluation and oversight.[147]

Labor unions and non-governmental organizations (NGOs) are also using bully pulpits outside the boardroom and shareholder meetings to advance workplace issues. Some unions leverage the pension funds they administer to steer the course of shareholder meetings. A group of New York city and state pension funds that collectively owns more than $5 billion of Amazon stock recently urged fellow shareholders to block reelection of two board members for what the funds claimed were Amazon's failure to protect worker safety and opposition to unionization.[148]

Many unions have stepped outside traditional organizing and collective bargaining to focus on lobbying state governments for legislation that sets minimum terms and conditions of employment for entire industries. Those legislative efforts have been especially pronounced in industries that rely on outsourced labor and franchising models that are not conducive to company-level collective bargaining. In what some commentators have called "social bargaining," this legislation often requires industry representatives and unions to negotiate administrative rules in addition to or instead of private agreements.[149] While industrywide bargaining is by no means new, recent legislation expands the role of state governments in bringing workers within the ambit of unions. For example, the California Industrial Welfare Commission, consisting of two union representatives and two employer representatives, has the authority to establish wages in particular "occupations, trades, or industries."[150] A proposed New York law would permit unions to represent ride-hail drivers and delivery workers at an "industry council," where they would negotiate with their companies over a set of working conditions that a state agency could codify and enforce.[151] A proposed California law would create an 11-member fast-food sector council, including union and employer representatives, to review and create workplace standards for fast food employees.[152]

International compacts and free trade agreements provide other avenues for challenges to employer actions. The AFL-CIO has urged businesses in the United States to sign the United Nations Global Compact.[153] Among other things, the Compact commits to collective bargaining and unionization irrespective of the laws of the jurisdiction in which they do business.[154] Beyond the Compact, some labor agreements incorporate the standards of the International Labor Organization to allow for cross-border collective bargaining. In addition, the U.S.-Mexico-Canada Agreement and the Korea-U.S. Free Trade Agreement provide detailed and robust mechanisms to challenge company compliance with international labor standards or deficient workplace conditions.[155]

How Company Leaders Can Prepare

With economic, social and other forces propelling fundamental changes in workers' relationships with their jobs, employers face significant challenges not just managing and retaining quality workers, but in creating the sorts of policies, processes and incentives that will allow the business to thrive in an increasingly competitive environment. Anticipating what further changes may be in store can help businesses better adapt and compete.

Addressing Employee Expectations for "Ownership" and Democracy

Takeaways for Employers:
Explore ways of broadening a sense of ownership among employees, whether through equity awards, profits interest, bonuses tied to company performance or other measures to align the financial interest of workers with company performance.
Identify non-monetary ways to create an ownership mindset and to provide a productive outlet for employee expression.
Be cautious about the consequences of surrendering too much in the way of ownership rights or managerial prerogative in response to what may be fleeting demands.

Ownership

As stakeholders in businesses and organizations invest money and airtime to share their values, many leaders no longer limit their purpose to delivering higher shareholder profits. Outside the organization, consumers give airtime on social media and invest in brands that share their values. Business leaders deliver value to their organizations by responding to these value-driven consumer demands for public purpose. On the inside, employees expect ownership in the company to remain engaged in their jobs.

Employee engagement is no small matter. In many professions, the cost of replacing a worker can average twice their annual salary.[156] Apathy reduces productivity and profitability—to the tune of $600 billion per year.[157] Some companies have responded by offering buyout bonuses to employees who would rather quit than keep working in their current job.[158] Ownership in the organization is usually viewed as an answer to employee disengagement.

Several leading private equity firms have recently banded together to create a new initiative called "Ownership Works" that seeks to create at least $20 billion of wealth for lower-income employees over the next decade by turning them into stockholders.[159]

Ownership comes in different forms. For some organizations, ownership means awarding employees equity in the business so that they can measure their personal finances according to the health of the business. But ownership is not strictly or even primarily financial. Employees increasingly demand purpose, and with it, expect for their values and input to be heard by business leaders. If an organization demonstrates a public purpose, employees will often have a sense of purpose in their roles at work.

Another way that employers try to deliver ownership to their workers is through the creation and support of affinity groups, sometimes called business resource groups. These employee groups are usually organized based on race, national origin, sex, gender, veteran status, other social identities and other common sets of interests in the workplace. Such groups have become an important tool for promoting productivity, diversity, recruitment, retention and professional development.

Workplace Democracy

A first cousin of employee ownership is a sense of workplace democracy—the notion that employees have the right to freely express their views on issues, whether or not it will directly impact the working environment, and to have their opinion count. While it may clash with the notion that an employer has the unilateral prerogative to set the terms and conditions of the workplace, growing demands for fair and equitable treatment will force companies to wrestle with the difficult task of balancing what workers expect and what the law provides.

As essential as affinity groups and other formal mechanisms for employee input have become, they create legal risks if not administered properly. The NLRA forbids employers from creating, supervising or influencing groups that negotiate working conditions on behalf of employees.[160] An employer-created affinity group does not typically violate the law simply by communicating ideas from its members to their employers. However, communication can quickly become negotiation. In that regard, an employer might unintentionally (and illegally) negotiate with affinity groups over terms and conditions of employment, much like a labor union.[161] Employers also risk discrimination claims if they deny employees participation or treat affinity groups differently based on the same protected characteristic.[162]

In addition, employers must ensure they properly compensate nonexempt employees for time spent participating in many affinity group activities.[163]

Addressing the Chasm between Varied Worker Arrangements and Existing Legal Structures

Takeaways for Employers:
Keep a close eye on emerging legal tests or interpretations of established tests that potentially undercut the classification of key workers or aspects of the company's business model.
Revisit conclusions about worker classification as worker roles, functions or duties change, as company business operations affecting workers evolve, and as legal standards in relevant jurisdictions are modified. Small adjustments can have potentially significant impact on legal status.
Explore opportunities for collaboration and advocacy to press for a comprehensive legislative solution to the classification conundrum.

The growing prevalence of work arrangements that do not fit a traditional employer-employee paradigm, combined with the torrent of worker classification lawsuits against gig and other companies that rely heavily on independent contracts in their business ecosystem, highlights the ongoing threat posed by these worker classification challenges. At the core is a growing chasm between the varied relationships of workers and their companies and what the law recognizes, on the one hand, and an increasing disconnect between presumptions of employee status and how people actually work (and want to work), on the other hand. Companies increasingly need to make clear-eyed assessments of the varied work arrangements they use in their business strategy. That often means evaluating the extent to which work arrangements safely fit one of the existing legal categories for workers. But varied as these new work arrangements may be, at least one feature unites many of them: they do not necessarily pair with rigidly distinct legal categories. And the threat to existing business models can be significant. Companies in the gig economy have for years faced a raft of challenges to the classification of workers that work through their apps. Even traditional franchise relationships can be at risk.[164] With rigid existing worker classification frameworks increasingly ill-suited to the way people actually work, it is past time for a comprehensive legislative solution at the federal level that establishes a uniform standard (with preemptive effect on diverging state tests) that provides greater clarity, order and certainty to businesses and workers—much as courts developed the "at-will" doctrine to meet the needs of a changing workforce over a century ago. Some companies have begun to promote such a "third way."[165]

Diversity, Equity and Inclusion as Paramount Value and Key Imperative

Takeaways for Employers:
Ensure that the company's goals and rhetorical commitment match what is realistically achievable.
Diversity and inclusion efforts must be implemented with a clear eye on the requirements of Title VII and other antidiscrimination laws. Well-intentioned efforts to promote diversity can easily morph into illegal affirmative action programs or run afoul of civil rights laws if not implemented in accordance with prevailing legal requirements.
Inclusive measures designed to expand applicant pools are less legally problematic than techniques that tend exclude persons based on protected characteristics or where such characteristics are used or considered expressly in employment decisions.
Carefully consider the legal and reputational risks of pursuing initiatives that have adverse effects on persons in groups not directly advantaged by diversity efforts.
Carefully consider the growing demands by stakeholders for disclosure of workforce demographic and diversity data and evaluate both the need for, consequences of, and alternatives to disclosure of EEO-1 or similar information.

Many companies no longer treat diversity, equity and inclusion just as an important company value, but as a critical business goal. While it can be difficult to establish a causal relationship between financial performance and diversity, companies in several industries report improvements based on certain performance measures after focusing on workplace diversity. In 2017, for example, the success rate of acquisitions and initial public offering (IPOs) was over 10 percent lower, on average, for investments by executives and partners with shared ethnicity and gender.[166]

With diversity in focus, organizations and businesses are increasingly setting goals for recruiting and retaining a diverse workforce up to and including senior leadership and board ranks. This may involve targeted recruiting to expand the pool of minority and female applicants and incentives to improve workforce diversity. Many organizations require a certain number or percentage of diverse candidates on every candidate slate, or hire diversity officers to certify recruitment plans. However, as important as many of these efforts often are to an organization's business strategy, there may be unanticipated consequences. Current and prospective employees can bring reverse discrimination claims. Proper implementation of a diversity program mitigates these risks.

Heightened Expectations of Transparency

Takeaways for Employers:
Ensure that confidentiality, non-disparagement and related provisions in offer letters, employment agreements, separation agreements, confidentiality policies and other company rules are consistent with emerging local, state and federal restrictions.
Pay careful attention to emerging NLRA rules on use of confidentiality provisions in the workplace, including around salary and compensation issues.
Consider the impact of changing rules on ordinary company decision-making and investigation practices and ensure the company has a reliable mechanism for staying on top of such changes.
Explore ways to create a culture of transparency and provide workers with an opportunity to express their views and to exchange information while mindful of NLRA prescriptions and limitations.

Increasing transparency will beget demands for yet more transparency, forcing employers to reorient their mindsets in respect to the confidentiality of their business decisions. Employee separations may no longer be private affairs. Some federal laws, like the NLRA, and state laws prohibit confidentiality policies that restrict disclosure of the terms and conditions of employment. Pay disclosure and pay transparency laws bring salary and wage wars into the open. Shareholder demands for transparency, as well as proposals on workforce demographics, can convert the internal workings of a business into content for proxy statements. With all these pressures and legal requirements, the ability of employers to keep their affairs confidential is eroding quickly.

Combined with hesitancy in courts to approve protective orders, employers must assume that everything they do will be open to public view. It is crucial that confidentiality policies, separation agreements and business practices both comply with the law and protect proprietary information, including trade secrets and intellectual property, that may be essential to a company's business model.

The Dollar Value of Ethical Conduct by Corporate Leaders

Takeaways for Employers:
Ensure that company rules and codes of ethics reflect the organizations values and help create a culture of ethical leadership. Such rules could include restrictions on undisclosed romantic relationships with co-workers in a supervisory relationship, vendors or other company partners and company codes of ethics.
Assume that any and all ethical, rules or other lapses by senior executives could wind up in *The Wall Street Journal* or "go viral."
Develop a framework for conducting internal reviews of misconduct allegations of the kind that stakeholders and government officials will expect or demand, considering, among other things, the potential need to disclose the results of the investigation and the reputational impact on the accused.

It has become critical for companies to select leaders through careful vetting, not just of their skills and qualifications, but also for their character. That imperative does not end once an executive is hired or promoted. It is just as important to implement and rigorously enforce policies to mitigate the risk of ethical missteps by employees, especially company leaders. Codes of ethics, anti-nepotism, non-fraternization and rules on appropriate off-duty conduct—once the matters of private concern—are now essential safeguards for a company's reputation. These policies are also important tools for companies to ensure that executives are maintaining reputational value that cannot easily be measured on a balance sheet but can dramatically influence the company's valuation.

Responding to Efforts to Address Workplace Conditions through the Company's Capital Structure

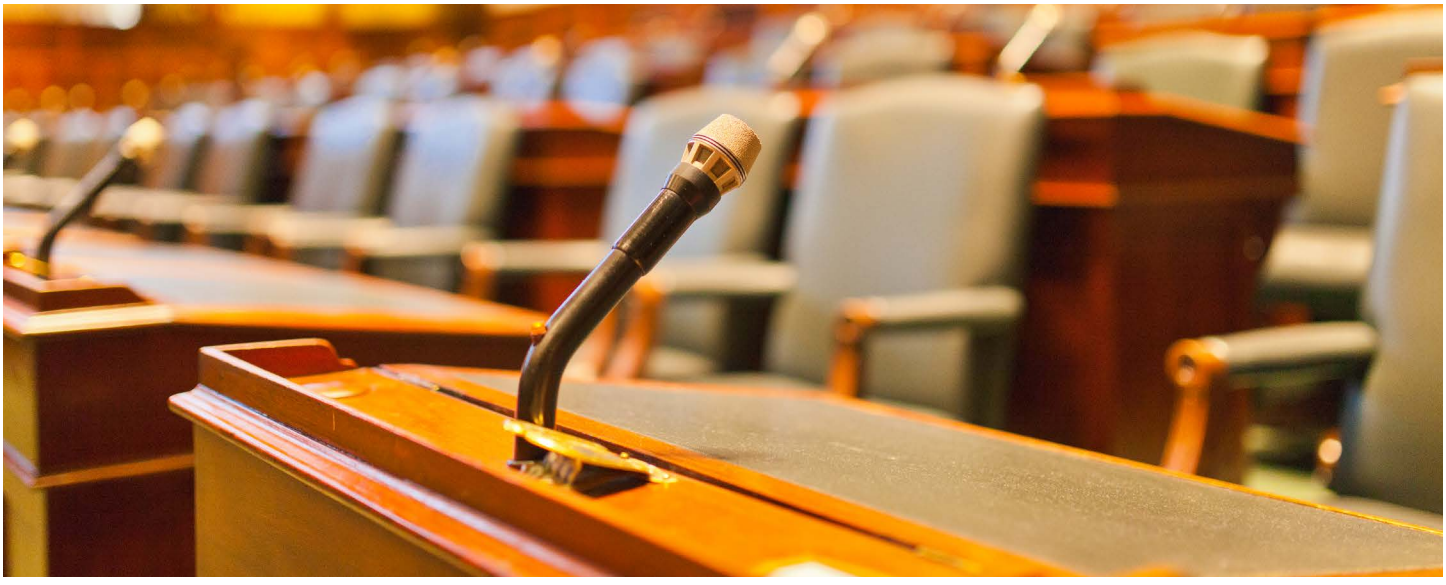
Takeaways for Employers:
Stay on top of emerging shareholder proposals affecting industry peers, including ones that appear to be gaining traction with shareholders.[167]
Pay careful attention to what leading investors and investor services are demanding and supporting and explore feasibility of remaining in step with those expectations.
Be mindful of "greenwashing" issues—i.e., public representations or disclosures that do not match the company's actual practices.
Explore opportunities for engagement with stakeholders pressing for change over workplace issues—there may be opportunities for collaborative solutions.
Carefully consider legal, reputational and operational impact of investor demands and consider potential alternatives.
Maintain a healthy level of skepticism over situations where initiatives through capital structure coincide with other events, such as union organizing, class action workplace lawsuits or similar events.

External stakeholders will continue to influence workplace conditions and policies through companies' capital structure. Shareholder proposals no longer focus principally on profits, but also deal with matters of social importance, including working conditions. Demands by major investors in private equity and hedge funds are not limited to portfolio performance, but also cover the gamut of workers' rights and other issues of public concern. Pension funds and investors from organized labor insist that firms institute responsible contractor policies and other worker assurances with their portfolio companies.[168] Some stakeholders expect firms to adopt policies of socially responsible investing. Anticipating and responding to socially conscious proposals requires deep awareness of direction and engagement with leading equity holders. That does not stop with activist investors. For public companies, it is important to monitor shareholder proposals throughout the industry, watch for those that get traction in proxy contests and evaluate how company practices compare. For privately-held companies, key investors, like pension funds and labor federations, may bring expectations about the direction of the business and that are far-reaching and may bind future dealings.

Leadership on Cultural and Political Issues

Takeaways for Employers:
Pick your battles. Recognize that staying out of, or limiting public comment on, an issue may be more important or less harmful than wading into it.
Ensure that the issues joined and company positioning and messaging are consistent with the company's broader corporate goals, mission and obligations, recognizing that shifting or inconsistent positions will be a separate basis for criticism.
Review company policies on use of Twitter and other forms of social media to ensure executives do not deviate from company messaging and expectations and that any limitations are consistent with emerging legal rules.
Consider engaging with a sampling of employees to gather input on hot button issues where the organization may be asked to comment by external stakeholders. Organizations can legitimately hold different core values.
If your organization has an established government relations function, recognize that transparency has removed the capacity to take one stance privately and a different one publicly. Increasingly, core values will need to be reflected in how companies lobby for public policy changes.

More than ever, workers expect that leaders will speak directly and authentically to issues of social and political significance, even if those have no apparent connection to the workplace. Many employees want their values reflected in their organizations. Silence in the face of outrage might be taken as assent. But it is important for business leaders to be cognizant to the countervailing risk of speaking out on hot-button political issues that may alienate workers, shareholders, consumers and other stakeholders. Diverse workforces and consumer populations often respond differently to issues of public importance. It is crucial that messaging navigate between tone-deafness and the partisan divide.



Workplace Safety as a Key Priority

Takeaways for Employers:
Most companies state in some form that safety of employees is a highest priority. It is worth reexamining how a company's budget, procedures, staffing, training and other processes related to safety line up with its rhetoric.
Identify areas of highest hazard and risk to employees, contractors and others; develop solutions to address those areas through better processes, engineering and other measures.[169]
Assess the skills, capabilities and experience of workers who are exposed to, or are in a position to create or control, the most significant hazards.
Pay attention to industry trends, along with incidents involving peers. Much can be learned from the experience of others.

Workplace safety is a critical priority in many high-hazard industries, like construction, refining, chemical, power transmission and distribution, and mining, to name a few. The pandemic raised awareness at many other companies to the importance of occupational safety and health at businesses where such issues had not traditionally been a concern. Regardless of the further trajectory of the pandemic, attention to workplace safety should remain a high priority.

Reinvigoration of Organized Labor and the Evolving Role of Labor Unions

Takeaways for Employers:
Don't assume that any company or location is invulnerable to organizing.
Watch for employee unrest and learn both the organizing risk factors and how to spot them in the workplace.
Train managers in labor organizing 101. With the decline in unionization over the past several decades, many companies no longer prioritize union-avoidance and labor law compliance training in the ordinary course.
Follow developments and trends in the industry and what organized labor is saying about your company.
Be aware of the ways that unions can bring together disparate actors and forces to coordinate attacks on the company's strengths and vulnerabilities in an effort to cause "death by a thousand cuts," and plan accordingly.

It is too early to say that "unions are back." The decline in union membership has been decades in the making. But recent, high-profile organizing successes, a tight job market giving workers more leverage, and increasingly-positive attitudes toward unionization require that employers revisit their potential vulnerability to union organizing, how they would approach such efforts if they were confronted with them and what steps they should be taking now to prepare.

Keeping Up with the Federal, State and Local (and International) Legal Mosaic

Takeaways for Employers:
Develop a reliable means to stay abreast of legal developments affecting the company.
Pay particular attention to issues that have significant operational impact—i.e., ones that may be impossible or impractical to implement beyond the jurisdiction to which they specifically apply or that fundamentally affect the company's business.
Devote particular attention to changes in the law related to post-employment restrictive covenants. The authority in this field is undergoing considerable change, both in the courts and legislatively. Annual bonuses and equity awards provide opportunities to update restrictions.
Consider developing a broader combined business/legal interdisciplinary strategy for navigating the evolving patchwork of state and local laws, particularly those that could have significant operational impact on the company's business model or operations. As noted above, laws in one jurisdiction (like on background checks, salary disclosure, or the like) could make it hard for the company not to change its practices across the board. Laws like ones that impose an ABC test that could fundamentally change a company's operating model in individual jurisdictions would benefit from equal attention and consideration of alternatives.

The increasingly complex mosaic of state and local laws forces employers to track and follow the laws in the many jurisdictions in which they operate. It also raises the possibility that laws in some jurisdictions could potentially change an operating practice for an entire company. State laws that prohibit inquiries into a job applicant's salary history could require a company to alter its nationwide practice, depending on where and who the company interviews for job openings. California's AB5 statute, which applies the ABC test for independent contractors, could challenge assumptions in entire industries about the employment relationship. That test may not be applied to the gig economy, depending on the outcome of a ballot initiative in 2022. As other states begin to adopt similar legal tests that expand the employment relationship in ways that fundamentally alter companies' business models, it will be increasingly important to ensure that workforces nationwide safely fit into their legal categories.

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153 See American Federation of Labor, Congress of Industrial Organizations, Global Worker Rights, available at https://aflcio.org/issues/global-worker-rights.

154 See United Nations Global Compact, Principle Three: Labour, available at https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-3.

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158 See Huileng, Tan, Amazon has suspended a program that pays up to $5,000 to warehouse workers who quit after peak seasons, Business Insider, Jan. 26, 2022, available at https://www.businessinsider.com/amazon-suspends-program-pays-warehouse-workers-to-quit-2022-1#:~:text=Under%20the%20program%2C%20Amazon%20offers,letter%20to%20shareholders%20in%202014.

159 See Ownership Works, available at https://ownershipworks.org/.

160 See 29 U.S.C. § 158(a)(2).

161 See Electromation, Inc., 309 NLRB 990, 995 (1992).

162 Cf. Moranski v. General Motors Corporation, 433 F.3d 537 (7th Cir. 2005) (holding that employer's refusal to grant affinity group status to employee's proposed Christian group did not constitute religious discrimination because the program treated all groups with religious positions equally).

163 See, e.g., Chao v. Tradesmen Int'l, Inc., 310 F.3d 904, 907 (6th Cir. 2002) (noting time spent attending employer-sponsored meetings and training programs is generally considered compensable under the FLSA).

164 See Patel v. 7-Eleven, Inc., 2022 MA LEXIS 146 (March 24, 2022) (on certified question from the U.S. Court of Appeals for the First Circuit, ruling that 7-Eleven franchisee could potentially be an employee for purposes of Massachusetts employment law under the Commonwealth's "ABC" test).

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169 A good example of this sort of approach is the Capacity Model utilized by energy industry contractor Quanta Services, Inc. See Quanta Servs., Inc., The Capacity Model, available at https://www.quantaservices.com/safety/capacity-model/.

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