

How ESG is changing the landscape in labor and employment law

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E. S. G. Three simple letters that have had, and continue to have, an enormous impact on the modern-day workplace. Indeed, over the past several years, ESG programs have taken on a markedly increased importance for domestic and international businesses facing pressure from all directions to align their strategy with environmental, social and governance issues. It is therefore paramount for companies to not only understand the hallmarks of an ESG program, but also the critical role that labor and employment law plays in identifying and addressing ESG risks and opportunities.

This article will explore why ESG is important in the labor and employment setting, and how it intertwines with the modern legal landscape.

Why is ESG important?

Environmental, Social and Governance (ESG) is a broad term that refers to a collective of factors used to evaluate companies.

Environmental factors include traditional issues like climate change but have also evolved to include new issues like replacing the traditional commute with work from home arrangements. Social factors draw on a company's workforce and its involvement with society, and includes topics like diversity, equity, and inclusion and humane working conditions. Governance addresses a company's external ESG efforts along with its internal efforts to govern itself and be accountable to its many stakeholders now focusing on ESG.

ESG issues are increasingly important for companies as regulators, investors, employees, and society as a whole are paying closer attention to companies' ESG efforts.

Regulators are increasingly requiring companies to establish ESG policies and practices. For example, several states have either passed or are considering laws that introduce a quota requiring publicly traded companies to include women on their boards of directors. Similarly, the U.S. Department of Labor is in the process of finalizing a rule that would enable ERISA retirement plans to consider ESG factors as part of investment selection and recently put out a "Request for Information on Possible Agency Actions to Protect Life Savings and Pensions from Threats of Climate-Related Financial Risk."

Moreover, employees, motivated by Black Lives Matter, #metoo, COVID-19, and other catalysts, are also driving companies to establish ESG policies and practices. Indeed, in 2020 union organizing increased, driven, in part, by COVID-19 and workers' desire for increased health and safety practices. During the so-called Great Resignation, companies are quick to pay attention to their employees' desires.

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Activist investors have also played a key role in companies' developing ESG policies. For example, certain investment firms have issued proxy voting guidelines that state they will press companies to demonstrate their commitment to mitigating climate risk and increasing diverse board membership. Even routine corporate due diligence increasingly probes companies' business culture to assess the strength of a target's ESG practices.

Companies are responding to the multifaceted push for ESG programs. After the U.S. Securities and Exchange Commission signaled it would be paying increased attention to ESG matters, the number of companies' proxy statements and 10-Ks discussing ESG programs has skyrocketed. Companies' increased focus on ESG appears fruitful as recent research indicates that companies with strong ESG programs yield better investment returns.

Role of labor and employment in ESG

With the increased focus on ESG, companies are increasingly seeking to be more than merely legally compliant and are wanting to go further to demonstrate their progressive positions with respect to ESG. And a successful ESG program should address several labor and employment issues.

For example, ESG programs typically address:

- Diversity, equity and inclusion (“DEI”)
- Pay transparency
- Whistleblowing
- Employee engagement
- Worker activism
- Health and safety
- Human resources policies
- Remote work
- Mental health and well-being

Given the numerous labor and employment issues implicated in ESG programs, companies would be wise to work with their labor and employment counsel to audit existing policies and practices to determine where areas of improvement may be and develop solutions to address weaknesses.

For example, with respect to DEI, after determining existing employee demographics, companies should develop policies and practices to increase the hiring and retention of diverse employees at all levels. Companies are increasingly linking executive compensation to achievement of ESG goals, including measurable improvement of DEI, and labor and employment issues are implicated with the drafting of these executive employment agreements.

With respect to whistleblowing, companies should ensure they have strong policies that encourage the reporting of any misconduct. Companies should also ensure effective training of management-level employees on how to recognize whistleblowing conduct and, equally important, how to respond appropriately.

For worker activism, companies would be well-served to partner with labor and employment counsel to understand the nuances of how to effectively respond to an organizing campaign and, potentially, even a union election and contract negotiation. The past year has already seen an increase in the number of organizing campaigns, and the Biden administration has indicated its strong support for such efforts. Accordingly, this area should be a key focus for ESG programs.

With respect to health and safety, COVID-19 has laid bare the essential nature of effective health and safety policies. Companies should pay close attention to labor and employment issues when navigating the myriad of federal, state, and local health and safety laws and, in the event of a workplace outbreak or accident, preparing an effective response. And, while not always top of mind

with health and safety programs, labor and employment issues arise in the form of wage and hour laws that may be triggered by health and safety policies, e.g., ensuring proper pay during any testing or screening time.

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COVID-19 has also upended the traditional notion of a workplace, requiring companies to quickly adapt to working from home. As companies prepare to return to the office and debate the future of their workplaces, by focusing on labor and employment issues companies can navigate employees’ accommodation requests that may implicate civil rights laws. Labor and employment issues are also intertwined with remote work policies that balance employees’ desire for flexibility with the need to ensure productivity and employee engagement.

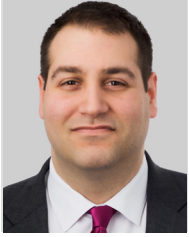
Last, but certainly not least, labor and employment counsel are also an essential partner when developing workplace policies related to mental health and well-being. Such policies should be not only proactive — creating a work environment that is supportive of employee mental health — but also reactive — ensuring companies respond appropriately to employees who notify their employer of mental health concerns. During a time where the importance of employee retention cannot be overstated, mental health and well-being programs and policies are vital to companies’ ESG programs.

Conclusion

As the discussion above demonstrates, ESG programs are intrinsically intertwined with labor and employment issues. As ESG programs take on increased importance and prevalence, companies would be well-served to ensure the development of their ESG programs is done in conjunction with labor and employment counsel. By doing so, companies will go a long way toward developing first-rate ESG programs.

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