A SEAT AT THE TABLE

Worker Voice and the New Corporate Boardroom

BUSINESS & SOCIETY
THE ASPEN INSTITUTE

Contents

Introduction

Perhaps more than any time in the last forty years, the needs and interests of workers now occupy the attention of corporate directors, CEOs and investors. Whether the focus is on wages, worker health & safety or diversity, equity & inclusion, the year 2020 elevated a wide range of worker interests and concerns, and opened up new conversations about how our modern economy treats workers. American corporate governance has been forced to survey a new frontier.

While boards are discussing worker-related issues more today, they still rely on indirect channels of information like employee engagement surveys and the opinions of senior executives. Absent direct worker engagement, it is difficult to know whether boards are having *the right* conversations to address worker concerns and receive worker insight about business operations.

These trends reveal an opportunity to strengthen America's corporate governance system. Currently, that system is poorly designed to address worker interests. Workers have no formal role in American corporate governance. CEOs, board directors and investors are far removed from the tens of millions who work at the front lines of business. Worker insights rarely inform board-level decisions and the risks shouldered by workers are too often undervalued. The result is wasted potential that if captured, could benefit companies, workers, and society as a whole.

What follows is a series of six essays that explore new ways to recapture this lost potential, authored by respected corporate governance practitioners and scholars. After a series of roundtables as part of the Aspen Institute Business & Society Program's Ideas Lab on Worker Voice in Corporate Governance, we asked these authors to share their fresh perspectives on worker voice in the boardroom. These essays are meant to challenge old assumptions and mindsets, and open important new conversations. We hope they can serve as a primer for boards looking for better ways to improve long-term decision making and for the corporate governance community to improve corporate oversight and accountability.

Judy Samuelson
Executive Director
Aspen Institute Business
& Society Program

Miguel Padró
Senior Program Manager
Aspen Institute Business
& Society Program

Expanding Diversity in the Boardroom by Adding Worker Voice

By David Berger[1]

Expanding Diversity in the Boardroom by Adding Worker Voice

By David Berger[1]

Directors recognize the importance of diversity. 2020 marked the first time every company in the S&P 500 has at least one woman director, and 59% of new directors in the 2020 proxy year were diverse.[2] These numbers have changed dramatically over the last decade; as recently as 2010 more than 75% of directors were white men, 60 Fortune 500 companies had no women directors and scholars and practitioners alike stated that the number of minority candidates on boards was "stagnant" and had "stalled."[3]

Calls for even greater diversity on boards are poised to continue. Large institutional investors, proxy advisory firms, state legislatures, Nasdaq and the SEC are all urging companies to expand efforts to attract diverse candidates. Even Goldman Sachs announced in 2020 that it would only underwrite IPOs of companies in the U.S. and Europe if the company had at least one diverse director, while stockholder activists are pushing diverse candidates in their attacks on companies.[4]

The reason for the strong consensus in favor of board diversity is simple: more diverse boards provide greater diversity of thought in the boardroom, creating greater long-term firm value in multiple areas, including more effective management, capital investment, innovation and other areas. For example, a multi-year study by McKinsey shows that there is a significant correlation between board diversity and higher profits.[5] Studies by Credit Suisse and FCLTGlobal have published similar findings, as have numerous scholars.[6] While some eminent scholars have criticized some of these studies,[7] the claims that mandating greater board diversity risks harming stockholder value have not been borne out.

> *"There is no legal impediment prohibiting a corporation from allowing workers to elect a group of directors."*

Evidence and momentum are growing

With the growing consensus in favor of increased gender and ethnic diversity on the board, boards are now being pressed to expand diversity of thought to the board by adding worker voice as well. Once again, the process is being led by empirical evidence that shows adding worker voice to the boardroom creates multiple benefits for the corporation. For example, a recent paper by MIT's Simon Jager and others found that companies with worker representatives on the board have a 16-21% increase in labor productivity, lower outsourcing and 40-50% larger capital stock invested in fixed assets, such as machines or factories, that all leads to greater productivity per employee.[8]

---

1 David Berger is Partner, Wilson Sonsini

2 https://www.spencerstuart.com/-/media/2020/december/ssbi2020/ssbi_2020_highlights.pdf

3 See generally Barbara Black, "Stalled: Gender Diversity on Corporate Boards," 37 Dayton L.Rev.7, 7-9 (2011)

4 See generally https://www.jdsupra.com/legalnews/new-york-s-disclosure-law-and-other-7815870/; https://www.forbes.com/sites/avivahwittenbergcox/2019/03/07/shareholder-activism-pivots-to-gender/?sh=5b6bbaee8b93

5 https://www.mckinsey.com/business-functions/organization/our-insights/delivering-through-diversity

6 See, e.g., https://www.fcltglobal.org/resource/data-shows-that-diverse-boards-create-more-value/; https://sloanreview.mit.edu/article/gender-diversity-at-the-board-level-can-mean-innovation-success/ (discussing how greater gender diversity on boards can lead to greater innovation)

7 See, e.g., Jesse M. Fried, "Will Nasdaq's Diversity Rules Harm Investors," ECGI Working Paper No. 579 (2021) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3812642

8 See Simon Jager, Benjamin Schoefer & Jorg Heining, "Labor in the Boardroom," NEBR Working Paper 26519 (August 2020) available at https://www.nber.org/papers/w26519?utm_campaign=ntwh&utm_medium=email&utm_source=ntwg18

A number of legislators have also begun urging companies to allow some directors to be elected by workers, most notably Senator Warren's *Accountable Capitalism Act* and Senator Baldwin's *Reward Work Act*. Both proposals would require companies to allow workers to elect up to a certain percentage of the Company's board of directors. Once again these legislators provide a strong rational for this view; according to a report issued by Senator Baldwin, companies with worker representation on boards (i) invest twice the amount that similar firms without worker representation do, (ii) create 9% more wealth for shareholders than comparable companies without worker representation, (iii) while communities that have corporations with workers on their boards distribute income more equally and provide their citizens greater economic opportunity, and (iv) pay wages 18-25% higher than companies without worker representatives on the board.[9]

The ideological barrier

There is no legal impediment prohibiting a corporation from allowing workers to elect a group of directors. For example, nothing in Delaware law prohibits a company from including a charter provision that provides a certain number of directors shall be elected by workers and/or requiring that a certain number of directors are employees of the company. Indeed, a corporation could create a separate class of stock solely for employees and give this class of stock the exclusive right to elect a certain percentage of the company's board of directors (and further provide that a departing employee must sell this stock back to the company upon the end of their employment).

Rather, the primary factor preventing a broader debate about whether employees should be considered as directors is ideological: the continuing dominance of the shareholder primacy ideology that controls the corporate governance debate in the U.S. equates the "best interests of the corporation" with the "best interests of shareholders." Under this theory any director who is not focused on maximizing (short-term) shareholder value is shirking their duty and unable to act in the best interests of the corporation. Yet as briefly described above, there is no empirical or other evidence to support this notion; rather, the evidence is to the contrary, including evidence from companies across the globe that have long histories with workers on boards.[10]

9 See Report from the Office of Senator Tammy Baldwin, "Reward Work Not Wealth" at 4 (October 2019) available at https://www.baldwin.senate.gov/imo/media/doc/Reward%20Work%20Not%20Wealth%20Baldwin%20Staff%20Report%203.26.19.pdf

10 See, e.g., Grant M. Hayden and Matthew T. Bodie, "Codetermination in Theory and Practice," 73 Fl.L.Rev.1 (2021) (concluding that "the emerging consensus of the studies of codetermination on firm performance is quite positive" and that "employee representation is accompanied by higher productivity, profitability and capital investment.")

The United States also has a long history of worker representation on corporate boards. For example, then-Massachusetts Governor Calvin Coolidge (hardly a radical Republican) signed a codetermination law for the state whereby manufacturing companies could set aside board seats to be elected by workers. More recently, in the late 1960s and 1970s, as evidence was growing on the benefits of having workers as directors, companies such as Ford, General Motors, AT&T and United Airlines all faced demands from labor to put workers on the board, and by 1980 Chrysler had put UAW President Douglas Fraser on its board.

"...as the dogma of shareholder primacy is replaced by stakeholder capitalism, boards should ask whether some of these stakeholders should also have the right to select directors."

Yet the same ideological forces that were promoting the "stockholder primacy" ideology in corporate law also attacked the notion of workers as directors. For example, Jensen and Meckling, the authors of a seminal article supporting shareholder primacy in 1976, wrote in 1979 that German codetermination would soon devolve into a system of shareholder control like the U.S. or, if employees dominated firms, then the German economy would grind to a halt like Tito's Yugoslavia, with "fairly complete, if not total, state ownership of the productive assets in the economy."[11] Shortly thereafter the Reagan administration denied clearance for the UAW to have a representative on the American Motors Corporation board as potentially in violation of the antitrust laws, and the nascent effort to add worker representation to the boards of U.S. companies largely ended.

An idea whose time has come?

How times have changed. Now that cracks are appearing in the ideology of shareholder primacy, it is time to reconsider the potential benefits from having some directors chosen by employees. Several studies have shown that employee representation on board provides for better performance on a variety of ESG measures, including climate policy, community support and job security (but interestingly not necessarily higher wages).[12] Simply put, the empirical evidence does not support the grave concerns raised about having employees represented on boards, while the most current studies show that adding employees to the board furthers many of the ESG goals that are broadly supported today, including by such organizations as the Business Roundtable.

Further, many of our best companies in recent years have employees on the board, including both founders and key employees. Many of these companies also have multi-class stock. While currently this structure has been designed for the primary purpose of allowing founders and other insiders to have extra voting shares, it could easily be adjusted to give employees the right to choose a certain number of directors.

In sum, as the dogma of shareholder primacy is replaced by stakeholder capitalism, boards should ask whether some of these stakeholders should also have the right to select directors. Allowing such a process, which is both common and quite successful in many of the OECD countries, could create even greater diversity of thought on the board, and provide boards with greater insight and ability to focus on all corporate stakeholders.

11 See Michael C. Jensen & William H. Meckling, "Rights and Production Functions: An Application to Labor-Managed Firms and Codetermination" 52 J. Bus. 469, 473 (1979)

12 See, e.g., Robert Scholz & Sigurt Vitols, "Board-Level Codetermination: A Driving Force for Corporate Social Responsibility in German Companies?" 25 Eur.J.Ind.Rel. 233 (2019) (codetermination positively associated with higher levels of CSR); Chen Lin, Thomas Schmid & Yuhai Xuan, "Employee Representation and Financial Leverage," 127 J.Fin.Econ. 303 (2018) (companies that have employees on boards are less likely to take as many financial risks); E. Han Kim, Ernst Maug & Christoph Scheider, "Labor Representation in Governance as an Insurance Mechanism," 2018 Rev. Fin. 1251 (2018) (finding that employees at codetermined firms are better protected against layoffs during industry downturns)

Director Perspectives: The Value of Worker Voice

By Michelle Greene[13]

Director Perspectives: The Value of Worker Voice

By Michelle Greene[13]

The relationship between companies and their workers is a uniquely symbiotic one. Each relies on the other for success. Arguably no one has more vested in the company's ongoing well-being than workers whose livelihood and economic security may be fully dependent upon it. Workers often know the company better than any other stakeholders. The company, in turn, relies on its workers and their excellence, dedication, productivity, and efficiency. Often, its workers are a company's most valuable asset and primary competitive advantage.

Workers have valuable perspectives to inform decision-making, reduce risk, and identify untapped opportunity. This perspective is particularly valuable to U.S. boards, which often lack consistent ways of hearing it. As societal and worker expectations evolve, U.S. companies must ensure that the worker voice is heard loud and clear as part of the boardroom conversation, including potentially by making worker-representatives members of the board.

This brief incorporates background input from conversations with executives, workers, academic experts, policymakers and board members. It summarizes insights from a series of interviews conducted for the Aspen Institute Program on Business and Society's working group focused on worker voice on boards. The interviewees were a unique group of directors with a comparative perspective – directors who currently sit on both one European board that includes employee board members and one U.S. board that does not have employee board members. We also interviewed experts who work with boards in both contexts. [14]

Worker Voice and the Current Moment

Boardroom discussions around worker voice are taking place in a rapidly evolving U.S. corporate context. One U.S. director noted that "three years ago we wouldn't have even been talking about worker voice in the board room." Although it has happened largely informally, interviewees noted that the demand for direct access to worker perspective is growing quickly among U.S. board members, as boards "realize that full information is not coming their way" without it. Directors increasingly are seeking direct access to management below the c-suite level.

Generally, the conclusion from European experiences is that the presence of worker board members makes boards more informed and effective (although it does pose challenges), and that worker perspective is critical to the ability of boards to do their jobs well.

---

13 Michelle Greene is President Emeritus and a Board Member of the Long-Term Stock Exchange

14 These confidential interviews were conducted as part of the Aspen Institute Business & Society Program's working group focused on worker voice on boards. To preserve confidentiality and allow interviewees to speak freely, we are not identifying any of the interviewees or using any identifying information about the companies where they serve. In this recap, all interviewees are referred to as "directors".

Worker Voice and Good Governance
Workers have a unique and valuable perspective that can strengthen boardroom deliberations. Workers know the company well, have a significant interest in its long-term success, and have a strong sense of emerging risks and opportunities. Workers are keenly attuned to safety, well-being, morale, and the effectiveness of corporate initiatives. All of these issues are of great interest to any company's board.

Workers can highlight emerging issues before they become large risks. One director noted that "some boards would be stunned to see what's actually going on in their organizations." One of the specific examples was a company where the CEO was treating female executives unfairly. The issue did not come to the attention of the board until the last female executive departed. The director realized that the employees had been keenly aware of the problem, and that it would have been raised sooner if workers sat on the board.

Workers often identify opportunities to make companies more productive and improve worker morale, on issues from compensation to worker benefits. For example, almost every interviewee mentioned the important role of worker voice in their companies' responses to the COVID crisis. Many feel that workers were able to highlight ways in which the company could be effective during the pandemic. When given the opportunity, workers offered solutions that helped keep businesses running. For example, at one large multinational company, although the national union was opposed to workers returning to work early in the pandemic, the employee representatives explained that the employees wanted to return and helped devise the safety standards necessary for workers to be comfortable doing so.

For the European boards, having worker board members in the room for conversations during the pandemic was particularly valuable, as they were able to build upon existing relationships and provide consistent worker perspective during their frequent board meetings in the early days of the crisis. Some directors noted that their U.S. boards also actively sought worker perspective during the crisis, although it was not always as consistent a voice.

Value of Worker Board Members
Among our interviewees, there was almost universal agreement that the presence of worker board members is more helpful than hearing worker perspectives in other ways (although all questioned how it would work in the U.S. context). One director noted that "Everyone on our board believes that having the workers on the board adds a lot of value." Another described that "[Employees] are good board members and they bring a perspective on all issues for the companies." Several directors noted particular value in hearing the employee perspective informed by the breadth of information available only to board members.

"...some boards would be stunned to see what's going on in their organizations."

Having workers as board members at the European public companies helps build relationships and trust. It enables more honest communication, particularly in one-on-one conversations between traditional directors and worker-directors. One director noted that the presence of workers "curbs some of the behaviors you otherwise see. Almost like having a conscience in the room." Another director articulated a universal theme among the interviewees, noting that on boards with worker board members, employee perspectives are raised "much more frequently and in a more authentic way" than on U.S. boards. Several directors noted that issues raised by employee board members are taken more seriously than they would be without an employee presence.

Employee participation on the European boards is highly impactful and valuable particularly on issues of compensation. One director noted that behavior in the U.S. would be different with worker board members because it would be "embarrassing to try to offer these increases to only executives with this kind of income inequality if [workers] were in the room." Another director described how this had worked in practice in a European company. Their board was increasing the compensation of management with a new equity plan. The worker board members suggested that the equity plan should be broadened to all employees, and this proved to

be an effective approach. At another company, a CEO agreed to a pay freeze during the pandemic because it was raised by the worker board members as important to employees.

Workforce reductions and layoffs are topics where directors feel that having employee board members in the room leads to significantly different conversations. Most noted that the conversations are more focused on ensuring that all options are explored before eliminating jobs and that when positions are eliminated, the departing workers are treated well.

Challenges of Worker Board Members

While the directors felt that the presence of worker representatives on their boards made them more effective overall, integrating worker board members also poses challenges.

- **Trust:** Directors feel that this is the most critical factor for success. Given the historic relationships between unions (who choose the employee board representatives) and management, the starting trust level is not always high. However, most directors feel that the individual worker board members have been effective in developing mutual trust with their board colleagues over time.

- **Confidentiality:** Managing boardroom confidentiality is essential for open communications, but can be a particular challenge for employee board members who are representatives of their unions. One director noted that confidentiality breaches have sometimes been unfairly blamed on the employee board members.

- **Selection:** As with all board members, the quality of the individual makes an enormous difference. A number of directors noted that the union selection process for the employee board members could be highly political. This made some question whether the individuals selected are chosen based on the qualities that would make them most effective as directors and whether they are the most representative of the workers as a whole. Some companies provide board member training for the selected workers, and directors feel this is important and effective.

- **Board Operations:** Many directors felt that board meetings have become overly "orchestrated," with little discussion beyond the prepared content and few probing questions. While this is a trend happening more broadly, they felt it was particularly acute in boards with worker-members. Conversely, in deeper conversations on difficult issues like lay-offs, although most felt the worker-members' input led to better outcomes, others noted it made the board "less efficient."

- **Bias:** Some of the directors noted that including workers on boards challenges the inherent elitism of boards. Particularly in companies with large numbers of hourly wage earners, directors noted an (at least initial) bias against employee board members who did not have the same backgrounds as other board members.

Worker Voice and U.S. Boards

Currently, U.S. boards depend heavily on the CEO and CHRO to communicate worker concerns to the board. Employee survey results were cited as the most common way that boards "hear" worker perspective. U.S. directors also noted that site visits have provided them with direct interaction with workers, with differing results. Some found the workers to be "on their best behavior," while others gained valuable insight from workers who were "very candid and willing to raise issues." In some cases, crises, including COVID, have provided an impetus for the board to engage with the workforce more broadly.

Directors offered a number of examples of more institutionalized approaches to bringing the worker voice into the boardroom currently in use in the U.S., including:

- Some boards require every member to make regular site visits.
- Another board plans each board meeting at a different factory/company location and sets up focus groups and discussion time for directors.
- Multiple directors interact with employees regularly in the context of Employee Resource Groups and DEI initiatives.
- Some companies invite their unions to make annual presentations to the board.
- One company sets up regular meetings between groups of three directors and focus groups of employees.

Implementation Input

Directors feel that more institutionalized approaches to ensuring worker perspective could significantly enhance the effectiveness of their U.S. boards. Directors also noted, however, that how this is achieved is very culture-dependent. Even in Europe, different countries treat worker representation on boards differently. None felt that the approach of any individual European country could be adopted directly in the U.S. due to differences in culture, laws, and the presence of unions.

Some additional ideas for increasing and institutionalizing worker voice on boards (from these interviews and other prior research and discussions) included:

- **Appointing** worker board members to the boards of U.S. companies (with one significant additional challenge to those discussed above being identifying appropriate ways to select effective representatives).
- **Creating** a trust that holds equity for workers and has the right to appoint a trustee to the board with a fiduciary duty to represent their interests.
- **Appointing** one or more directors to be responsible for meeting regularly with workers and reporting back to the board on the worker perspective (some boards have such an approach for ESG).
- **Ensuring** that business line human resource officers are able to report directly to the board.
- **Scheduling** regular presentations by employee groups to the board (perhaps in sessions without company executives present).
- **Creating** special committees of employees to provide input on important decisions (e.g plant closings, relocations, expansions, etc).
- **Forming** an advisory board of employees that provides regular input both on topics requested by the board and on those that the employees believe the board should hear (although this ideas was also criticized as "too formal, without power").
- **Requiring** every board member to have regular meetings with employees and/or employee groups.

As the expectations of companies and their workers change, U.S. companies that fail to effectively integrate employee perspectives into their board deliberations are taking on risk and missing opportunities. The best U.S. companies will institutionalize loud and clear worker voices in their boardrooms.

Reimagining Board Committees to Accommodate Worker Voice

By Doug Chia[15]

Reimagining Board Committees to Accommodate Worker Voice

Doug Chia[15]

Demands for worker voice are on the rise, and if trends continue, boards could soon be challenged to accommodate worker voice more formally in corporate governance. Rather than being caught flat-footed, boards can start reimagining now. Looking at their own committees would be a good place for boards to start.

The board hears worker voice, but through a thick filter.

Any discussion of corporate governance starts with the board of directors, and the issue of worker voice in corporate governance is no different. Under the U.S. governance model, worker voice has typically been articulated to the board via senior management. Obviously, it is virtually impossible for that articulation to give the board a true sense of how members of the general workforce see their places and feel about their experiences as employees of the corporation. While many boards receive reports on the results of periodic employee sentiment and engagement surveys, those reports are prepared by senior management and the results are presented on broadly aggregated bases.

The fact that boards generally do not take more proactive measures to hear the voices within the general workforce follows from the view of many corporate governance experts who espouse that the board's entire role can be boiled down to hiring, evaluating and firing the CEO. While the board's duty of care requires it to oversee the entirety of the corporation's business and affairs, hearing and responding to the voice of workers below the CEO is seen as part of the operational responsibilities of the CEO and other executives like the chief human resources officer, not the board itself.

Lessons from new corporate disclosures.

Historically, SEC disclosure requirements did not cover how the board or management oversee the company's workforce or even much about the company's workforce at all. In 2020, the SEC amended its rules on annual corporate disclosures to require registrants to describe their "human capital resources… and any human capital measures or objectives that the registrant focuses on in managing the business."[16] A number of organizations have examined the initial corporate disclosures made in 2021 to comply with the new requirements in an attempt to get a sense of the role of boards in overseeing how companies manage their human capital resources.

15 Doug Chia is Fellow at the Center for Corporate Law and Governance, Rutgers Law School

16 "Modernization of Regulation S-K Items 101, 103, and 105" Securities and Exchange Commission (August 26, 2020)

According to a report from Intelligize, the new corporate disclosures reveal that many companies "vest authority for managing human capital with the board of directors, its committees (the audit, compensation, corporate governance, and management development committees were mentioned most frequently) and officers (particularly CEOs, diversity officers and chief human resource officers)." Both Compensation Advisory Partners and Intelligize highlight Starbucks Corporation as a model of disclosure on board oversight:

> *Our Board of Directors and Board committees provide oversight on certain human capital matters, including our Inclusion and Diversity programs and initiatives. As noted in its charter, our Compensation and Management Development Committee is responsible for periodically reviewing Starbucks partner resource programs and initiatives, including healthcare and other benefits, as well as our management development and succession planning practices and strategies. Our Audit and Compliance Committee works closely with the Risk Management Committee, led by Starbucks CFO and general counsel, to monitor current and emerging labor and human capital management risks and to mitigate exposure to those risks. Furthermore, our Nominating and Corporate Governance Committee annually evaluates the effectiveness of our social responsibility policies, goals and programs, which also include partner-related issues. These reports and recommendations to the Board and its committees are part of the broader framework that guides how Starbucks should attract, retain and develop a workforce that aligns with our values and strategies.*

Seeking more detail on *how* boards provide oversight on the management of human capital resources, the Council of Institutional Investors (CII) issued a report focusing on "public disclosures of how large U.S. public companies provide opportunities for board members to interact directly with employees, both at the management level and deeper within the organization."[17] CII observed that "many boards of directors are elevating company culture in their oversight of corporate strategy and risk… dedicating more time to presentations from human resources personnel, visiting worksites and assessing top management's success in setting an appropriate 'tone at the top.'" The CII report went on to say, "[s]upport is growing for explicit policies that encourage director interaction with rank-and-file employees as a way for boards to better oversee corporate culture." CII also cited recent reports from KPMG, Deloitte and the National Association of Corporate Directors (NACD) that identified site visits and interaction with employees as "options for boards looking to improve oversight of corporate culture."[18]

Access to workers is granted, but is it used?

Regarding the board's access to the company's employees and opportunities for engagement, the CII report cited common approaches disclosed by the largest (S&P 100) U.S. companies:

- Almost all have policies stating that board members have access to either employees generally or management.
- Approximately half have policies specifically granting board members access to all employees.
- Approximately one-third have policies granting board members access to management without explicit mention of access to or interaction with other employees.
- Approximately two-thirds have policies granting board members access to employees or specific guidelines for board-employee interaction.
- One-fifth disclosed both policies on employee access and a discussion of specific circumstances where board members have the opportunity to speak with employees.
- More than one-third detailed some kind of board-employee interaction.

17 Nussbaum, Lucy *Board-Employee Interaction; Disclosure on Policies and Practices,* CII Research and Education Fund (January 2021) https://7677c7b7-7992-453f-8d12-74ccbdbee23c.filesusr.com/ugd/72d47f_e6e625ef890d49999d19b119428361c0.pdf

18 See "Human Capital Disclosure Report: Learning on the Job", Intelligize (2021); Engel, Margaret "New Human Capital Disclosure Requirements: An Early Read on Developing Best Practices" Compensation Advisory Partners (January 12, 2021); Also Starbucks Corporation Form 10-K (September 21, 2020)

What is not clear from the disclosures is whether board members are actually using the access granted and to what extent that access must be pre-arranged and chaperoned by senior management. When there are opportunities for board-employee engagement through visits to manufacturing, retail and R&D sites, experienced corporate staffers who have arranged board site visits reveal that they are extensively planned and rehearsed. Senior management at the sites carefully select and vet the employees who will interact directly with board members, and selection is made with the grooming of "high potential" employees in mind more than the board's goal of hearing worker voice.

"...expanding the compensation committee's perspective beyond executive compensation would make the committee think about the company's workforce as a whole"

What *is* clear is that boards would have to be proactive in using the access granted to them and go to great lengths to create regular opportunities to hear rank-and-file workers' voices directly from the workers themselves and engage in candid dialogue away from the watchful eyes (and sensitive ears) of senior management.

Time to form, or reimagine, a board committee?

Some experts have suggested that boards make changes to their own structures to ensure meaningful oversight of human capital resources. Currently, the only mandated board committee that directly touches employee issues is the compensation committee, for which the chief priority is determining the CEO's compensation. While the compensation committee may oversee retirement and benefits plans that cover wide swaths of employees, they focus more of their attention on the short- and long-term incentive plans that apply only to high-ranking managers. And that's when they are not talking about the CEO's compensation and wordsmithing the related proxy disclosures.

Former Delaware Supreme Court Chief Justice Leo E. Strine, Jr. recently proposed a "reconceived compensation committee" to "help make corporations more responsible employers and restore faith in American capitalism."[19] Chief Justice Strine and his co-author, Kirby M. Smith, wrote that expanding the compensation committee's perspective beyond executive compensation would make the committee think about the "company's workforce as a whole" and "result in directors who have a better grasp on how human talent matters for the company's business strategy and operations."

> *In this way, the reconceived compensation committee will become the subset of the board most deeply engaged in all aspects of the company's relationship with its workforce, and inefficiently ensuring that the company has a sensible plan for retaining and motivating human talent to achieve its business objectives.*

This follows what has up until recently been a slow trend. Realizing that the scope of their compensation committees have been too narrowly focused on the compensation of the directors and most senior executives, boards are now increasingly expanding the scope of these committees to include talent development beyond the executive suite and cover company-wide human resources, not just remuneration. Still, most do not go as far as Chief Justice Strine would like.

---

19 Strine, Leo and Smith, Kirby, "Toward Fair Gainsharing and a Quality Workplace for Employees: How a Reconceived Compensation Committee Might Help Make Corporations More Responsible Employers and Restore Faith in American Capitalism" U of Penn, Inst for Law & Econ Research Paper No. 20-37, Harvard John M. Olin Discussion Paper No. 1035 (June 4, 2020) available at SSRN: https://ssrn.com/abstract=3619273

Chief Justice Strine separately proposed that boards be required to create "workforce committees" to "address workforce issues," including "ensur[ing] quality wages and fair worker treatment," at the board level.

> *These workforce committees would be focused on addressing fair gainsharing between workers and investors, the workers' interest in training that assures continued employment, and the workers' interest in a safe and tolerant workplace. These workforce committees would also consider whether the company uses substitute forms of labor, such as contractors, to fulfill important corporate needs and whether those contractors pay their workers fairly, provide safe working conditions, are operating in an ethical way, and are not simply being used to inflate corporate profits at the expense of continuing employment and fair compensation for direct company employees.*[20]

I also recently urged boards to rethink the current board committee structure and reimagine the board's committees in a stakeholder-driven way.[21] Following the resurgence of the stakeholder model of corporate governance, I proposed completely redesigning the board committee structure to create separate board committees dedicated to each of the corporation's four major stakeholders: customers, employees, communities, and shareholders. A board committee dedicated to the corporation's employees could conceivably cover enterprise-wide strategy and oversight of employee staffing levels, health and safety, compensation and benefits, labor relations, diversity and inclusion, talent development, recruitment and retention, training, engagement, and corporate culture.

Board committees are of particular interest because a board typically creates committees, either standing or *ad hoc*, for a subset of the board to dive deep into particular board responsibilities and report back to the full board with recommendations for board action. If worker voice is to be made a board priority, that initiative should start with a dedicated board committee.

---

20 Strine, Leo, "Toward Fair and Sustainable Capitalism: A Comprehensive Proposal to Help American Workers, Restore Fair Gainsharing between Employees and Shareholders, and Increase American Competitiveness by Reorienting Our Corporate Governance System Toward Sustainable Long-Term Growth and Encouraging Investments in America's Future" U of Penn, Inst for Law & Econ Research Paper No. 19-39, Harvard John M. Olin Discussion Paper No. 1018 (October 3, 2019) available at SSRN: https://ssrn.com/abstract=3461924

21 See https://www.soundboardgovernance.com/post/rethinking-board-committees

Those Who Work are Labor Investors: Recognizing the Two Core Constituencies of Capitalist Firms

By Isabelle Ferreras[22]

Those Who Work are Labor Investors: Recognizing the Two Core Constituencies of Capitalist Firms

Isabelle Ferreras[22]

Work is an *investment*[23] by those who perform it. A worker *invests* not just their quantifiable skill, time, and effort, but their entire person – their physical self, their intelligence, their emotions – in their labor. This includes their care for and feelings toward co-workers or others as they go about their jobs. Teachers, delivery workers, nurses, cashiers, lawyers, doctors, computer programmers – everyone, no matter how their job is perceived or remunerated, invests themself, their mental and physical health, in the work that they do. And as the current pandemic has shown all too clearly, they even risk their lives for it.[24] As clear as this has become, work is not an investment in the sense used in economic discourse; an investment of work is harder to quantify than in investment of money.

"Labor is not a commodity."

Declaration of Philadelphia, 1944 International Labor Organization

And yet, despite moments such as this one when the investments of workers – even those who generally remain invisible because of the subaltern positions they hold – have been declared "essential," their contribution to society has not yet been truly recognized or rewarded.

In search of solutions, improving wages and supporting collective bargaining garner the most attention. And there is much progress to be made in these areas. But justice at the distributive level[25] is not enough. Democratic justice *within* firms is also needed.

Democratizing work recognizes that labor investors have an equally legitimate claim to the ends as well as the means of the joint economic endeavor of a firm as financial investors. Labor investment and financial investment are equally essential to the capitalist firm's existence. Without labor investment, there would be no product produced, no service performed. Workers are not stakeholders, they actually constitute the firm. This is true whether or not the laborers in question benefit from the formal status of employee. Even in extreme cases, such as the gig economy, it remains true. Corporations may not wish to recognize these laborers as their own employees, but without drivers, for example, it is plainly obvious that no one would put money into shares of the Uber corporation. Uber depends on labor investors for profit; indeed, for its very existence.

From the rise of sub-contracting and offshoring in the 1980s to the recent growth of the gig economy, more and more corporations are deploying *fissuring* strategies aimed at keeping labor investors from even the most basic labor protections, seeking to escape even the most basic responsibilities associated with the role of employer.[26]

Just as important, perhaps, these strategies aim to hide or distract from the fact that the capitalist firm is made of two core constituencies – and in particular, from the fact that only those who bring in capital, and not those who invest labor, have a voice in firm government.

---

22 Isabelle Ferreras is Senior Tenured Fellow of the Belgium National Fund for Scientific Research (FNRS), Full Professor at the University of Louvain (UCLouvain), Belgium, Senior Research Associate of the Labor and Worklife Program at Harvard Law School, Director of the Class Technology & Society and President of the Royal Academy of Sciences, Letters and Fine Arts of Belgium

23 For more about this perspective about work, see Ferreras, Isabelle (2017) *Firms as Political Entities. Saving Democracy through Economic Bicameralism*, New York City/Cambridge: Cambridge University Press

24 Beyond care work, see in particular the terrible circumstances of workers in meat processing plants.

25 See Saez, Emmanuel Saez and Zucman, Gabriel (2019) *The Triumph of Injustice: How the Rich Dodge Taxes and How to Make Them Pay* New York, W.W. Norton

26 I have called this legal strategy: Reductio ad Corporationem, see (Ferreras 2017, op. cit.); on the managerial strategy, see Weil, David (2014) *The Fissured Workplace*. Harvard University Press

Workers are Risk-Bearing Investors

Labor investors put their mental and physical health at risk when they go to work – they invest their entire selves. By comparison, the risk taken by capital investors is limited; hence the term "limited liability." The risk taken by capital investors is restricted to a sum of money they put into the endeavor – an asset external to their own person as a physical and psychological being, in other words. The risk borne by labor investors is not. An investment of labor is, both literally and figuratively, highly personal. Beyond this fundamental difference, labor investors run the risk of losing their professional status and skills if something goes wrong with their investment.[27] There is no *limit*, in other words, to the risk they run.

"Workers are not stakeholders, they actually constitute the firm..."

The time has come for society as a whole and companies in particular to recognize workers' contributions, particularly those who, during the pandemic, have shown just how essential they truly are. The same is true for those workers who have stayed in their homes, shouldering the impossible mission of working remotely alongside children and family members sheltering with them, meeting the goals and targets of their organizations from home offices, dining tables, and repurposed living spaces. It is not enough to recognize these contributions with messages of gratitude broadcast over social media by more or less earnest internal communications departments. Truly acknowledging this indispensable labor investment means deepening the political rights of labor investors, a right capital investors have enjoyed since the birth of corporate law.

More employees recognize their power

In the past few years, from within several major firms, employees have attempted to voice their own views about their firm's strategy to their own top management[28]. In May 2018, thousands of Google employees wrote to their CEO, Sundar Pichai, and asked him to drop the "Maven Project," which provided artificial intelligence to a Pentagon drone program.[29] Dozens of employees resigned in protest. In June 2018, Microsoft employees protested a contract with the United States Immigration and Customs Enforcement Agency because of its inhumane policy of separating children from their parents.[30] In August, U.S. employees of Twitter objected to opaque processes surrounding decisions to shut down accounts for inappropriate content.[31] In November 2018, Google employees organized the first transnational walk-out in the company's history voicing their condemnation of the top management's handling of the sexual harassment, systemic racism, and gender inequality which have plagued the life

---

27 Indeed, as the practice of including a non-compete agreement in the labor contract has become more pervasive, this risk is becoming even greater.

28 For more comments over these examples, see Ferreras, Isabelle (July 2019) "Democratizing Firms. A Cornerstone of Shared and Sustainable Prosperity" Center for the Understanding of Sustainable Prosperity Essay Series, University of Surrey, U.K., Essay #10

29 "We believe that Google should not be in the business for war," its employees stated in a letter publicized by the New York Times: https://www.nytimes.com/2018/04/04/technology/google-letter-ceo-pentagon-project.html?smid=url-share

30 "As the people who build the technologies that Microsoft profits from, we refuse to be complicit," the employees said in the letter, obtained by the Seattle Times. "We are part of a growing movement, comprised of many across the industry who recognize the grave responsibility that those creating powerful technology have to ensure what they build is used for good, and not for harm." https://www.seattletimes.com/business/microsoft/microsoft-employees-call-on-company-to-cancel-contract-with-ice/

31 https://www.wsj.com/articles/inside-twitters-long-slow-struggle-to-police-bad-actors-1535972402

of the organization. Thousands of employees met outside Google offices in San Francisco, New York City, Dublin, London, Zurich, Haifa, Tokyo, and Singapore.[32] In June 2019, 8,000 Amazon employees signed a letter to its shareholders to ask that company strategy be aligned to respect planetary boundaries as detailed in the latest IPCC report. In January 2021, Twitter and Facebook employees were instrumental in their pressure on the CEO to ban the President of the U.S. out of their social network. These instances illustrate the fact that labor investors have views and expectations about the strategy of the firm. Nevertheless, they remain excluded from its governance structure, which remains in the hands of its capital investors alone.[33]

Firms are political entities with key economic dimensions, whose very existence is made possible by the joint investment of labor and capital. But despite the fact they would not operate without the former, firms currently only recognize the rights of the latter, those who contribute financial capital, via the structuring of capital investment in the corporate structure which is given a monopoly of the – political – rights to govern the firm.[34] Labor investors should be recognized as the forgotten constituency of the firm, and as such, should be afforded the same rights in its government. Corporate law should require that labor investors, as capital investors, benefit from at least the same rights as those enjoyed by capital investors, and have thus a defining role in strategic corporate decisions.

---

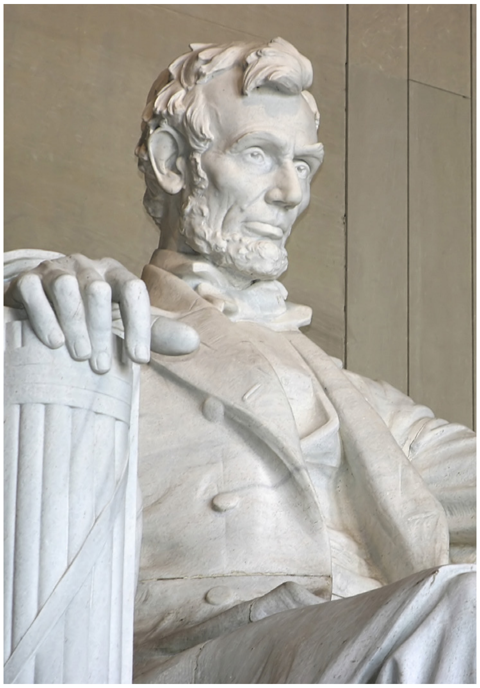
32 https://www.theguardian.com/technology/2018/nov/01/google-walkout-global-protests-employees-sexual-harassment-scandals

33 In *The Mind of The Leader* (2018, Harvard Business Review Press), Rasmus Haugaard and Jacqueline Carter present extensive research covering more than 35,000 leaders and including interviews with 250 C-level executives. They conclude that "organizations and leaders aren't meeting employees' basic human needs of finding meaning, purpose, connection, and genuine happiness in their work. 77% of leaders think they do a good job of engaging their people while 88% of employees say their leaders do a bad job with engagement, and 65% of employees would forego a pay raise to see their leaders fired." This speaks volumes about the extent to which employees put their own conceptions of justice before economic gain. Unsurprisingly, the solutions put forth in the business literature are individual-centered and not structural: "To solve the leadership crisis, organizations need to put people at the center of their strategy. They need to develop managers and executives who lead with three core mental qualities: Mindfulness, Selflessness, and Compassion." Another figure highlighted in the book is worth mentioning, as well: "And this is despite the fact that $46 billion is spent each year on leadership development." That is a substantial amount of money, which could be put to better use reforming and nurturing structures of firm government capable of seriously taking employee voice into consideration.

34 For a more in-depth discussion of the firm's two constituents, of work as a political experience that mobilizes conceptions of justice, and of firms understood as political entities, see Ferreras, Isabelle (2008) *Critique politique du travail. Travailler à l'heure de la société des services*, Paris: Presses de Sciences Po; Ferreras, I. (2012) *Gouverner le capitalisme? Pour le bicamérisme économique*, Paris: Presses universitaires de France; Ferreras, I. (2017) *Firms as Political Entities. Saving Democracy through Economic Bicameralism*, New York City/Cambridge: Cambridge University Press

What services should be provided? Who will serve as CEO? What products should be developed? Who should benefit from them? With what means? How can efforts and profits be fairly distributed? In all these questions, labor investors ought to have a right to collectively validate the decisions of the firm. This is the principle affirmed in the Working Manifesto.[35] Unlike capital investors who are impacted by the firm's decisions, labor investors are the only one constituency who is governed by the firm's decisions. Just as corporate law has long recognized the right of capital investors to bear on firm's strategic decisions, it is high time to enfranchise workers so they can enjoy at least similar rights to weigh on the government of firms.[36]

"...labor investors are the only one constituency who is governed by the firm's decisions."



Labor is prior to and independent of capital. *Capital is only the fruit of labor, and could never have existed if labor had not first existed.* ***Labor is the superior of capital, and deserves much the higher consideration.*** *Capital has its rights, which are as worthy of protection as any other rights. Nor is it denied that there is, and probably always will be, a relation between labor and capital producing mutual benefits…*

Abraham Lincoln
December 3, 1861
State of the Union Address

---

35 This is the basic democratic intuition. It is affirmed in the Working Manifesto (see www.DemocratizingWork.org published in May 2020 and signed by more than 6,000 scholars, including Elizabeth Anderson, Dani Rodrik, Thomas Piketty, Katharina Pistor, Marshall Ganz, Joshua Cohen, …): "workers should get the right to collectively validate or veto the [firm's] decisions". Forthcoming at The University of Chicago Press, Spring 2022: *The Working Manifesto*, Isabelle Ferreras, Julie Battilana, Dominique Méda ed.

36 See the other Aspen Institute note by Julie Battilana and Isabelle Ferreras. In a nutshell, to implement this recognition, Boards should requiring that the total membership of a firm's Board of Directors or equivalent governing body be comprised of between 30 and 50% labor representatives, elected by the firm's workers; and to obtain a supermajority vote on any decision that directly and significantly affect workers, from the Board's labor representatives. This is based on the original proposition made in the Clean Slate for Worker Power Report, Sharon Block and Ben Sachs, January 2020, Harvard Labor and Worklife Program, pp. 71-73. In practice, this means that these worker representatives, whatever their actual number on the corporate board, would form a labor college among which a majority of votes should be secured for any decision to be passed by the Board, as well as any decision made by shareholders directly according to corporate law, which concerns merger or termination of the corporation. This is the principle of requiring dual majorities – a majority of the Board members appointed by the shareholders, and a majority of the labor representatives on the Board, for board decisions to be ratified. See Ferreras, 2017, op. cit.

Why (and How) Workers Should Be Represented on U.S. Corporate Boards

By Lenore Palladino[38]

Why (and How) Workers Should Be Represented on U.S. Corporate Boards[37]

Lenore Palladino[38]

Under U.S. corporate and labor law, workers have no voice in major corporate decisions, including who to hire and how to compensate a CEO, whether to merge or acquire another firm, what kind of shareholder payments to authorize, and how to outsource production. Even when employees are unionized, collective bargaining is limited to the terms and conditions of employment. As workers are the main stakeholder group directly engaged in the production and delivery of goods and services, they should share governing power within American corporations through meaningful representation on corporate boards of directors. This will enable workers to have a voice in major corporate decisions and benefit the corporation by bringing the employee perspective on risks and opportunities into the boardroom.

Workers[39] are essential to any innovative corporation, and they have both more to gain and more to lose from the decisions of any corporation than do shareholders (Bodie 2016, Greenfield 2006; Jacoby, 2001; Lazonick and Shin 2020; O'Sullivan 2000). Worker representation on corporate boards can complement, though certainly not supplant, collective bargaining and union representation. Worker representation on the corporate board would give workers a role in a different set of corporate decisions that affect the broad workforce than those touched by bargaining over terms and conditions of employment under current U.S. labor law (Liebman 2017).[40]

"...the innovation process is not mechanical. Management directs a dynamic, risky and uncertain process, and workers and management learn together."

Workers Are a Source of Important Strategic Information

Ideally, business corporations innovate and increase market share by producing higher-quality products while utilizing fewer inputs. Successful innovations will meet a market demand and be rewarded with commercial success. But the innovation process is not mechanical. Management directs a dynamic, risky and uncertain process, and workers and management learn together. This collective knowledge has enormous long-term strategic and operational value.

A robust mechanism for worker representation on boards should increase the flow and quality of information between employers and employees and enhance company productivity. (On the other hand, a poor mechanism for gathering workforce information can mute these benefits.) Unfortunately, in the United States robust mechanisms for worker representation are in short supply, particularly given the current extremely low levels of unionization in the private sector.

Tailoring Worker Representation for the U.S. Context

How would worker representation on corporate boards work in the U.S.? Though Germany and much of Europe have a decades-long history of codetermination, the European model of worker representation on supervisory boards, in the context of sectoral collective bargaining, cannot simply be imported into the United States.

---

37 This Brief is adapted from Palladino (2021), "Economic Democracy at Work: Why (and How) Workers Should be Represented on U.S. Corporate Boards" available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3476669

38 Lenore Palladino is Assistant Professor of Economics and Public Policy, University of Massachusetts Amherst and Fellow at Roosevelt Institute

39 I use the term "worker" to refer to both formal employees and workers who may be misclassified as independent contractors but are properly understood to be under the control of the corporation.

40 An alternate approach to policy reform would be to expand the scope of bargaining under labor law; however, without expanded unionization, this would still only cover a small percentage of the workforce.

In addition to overcoming the paucity of existing mechanisms for worker voice, worker representation on corporate boards requires careful attention of U.S. labor law that is determined at the federal level, along with corporate law which is overseen at the state level. Some mechanism for Federal oversight will likely be required such as a federal charter for incorporation to be layered on top of state incorporation (which is the approach proposed by Senator Elizabeth Warren in the *Accountable Capitalism Act),* or other procedural mechanisms, such as requiring board-level worker representation for companies that register of national securities exchanges (such as in the *Reward Work Act)*.

In order to make room for worker representation on boards, American corporate governance will need to expand its assumptions about labor's contribution to a corporation and its value to long-term strategy, oversight and accountability. Despite workers' obvious importance to the success and survival of any corporation, shareholder-centric U.S. corporate law largely ignores the relationship between worker and company. The public, corporate leaders and some investors increasingly recognize that labor is more than simply a commodity to be purchased by a corporation and that wages do not reflect workers' contributions to a firm but corporate law lags on these trends.

Sound design of worker representation on boards requires comprehensive policies that address:

- How workers should elect worker-directors.
- Who may be considered a "worker" for those elections?
- Will non-formal employees who have a relationship with the employer of substantial control be counted as workers who have a vote? (Weil 2014)
- Who is eligible to serve on the board?
- What kind of organizational mechanism will the company use to ensure that worker-directors adequately represent workers?
- How will worker mechanisms at the board level interact with U.S. labor law and union presence where it exists?
- How will such mechanisms fit within U.S. labor law's general prohibition on joint management-labor committees?
- What rules should govern the board participation of worker-directors?
- Where employees are granted equity ownership, how does it interact with worker representation on the corporate board?
- What proportion of the board will be allocated to worker representatives?
- One mechanism to ensure that worker-directors have a meaningful collective voice is for corporate bylaws to require over two-thirds of board directors to vote in favor of significant corporate decisions, such as dissolution or merger; in this case, a one-third proportion on the board would be sufficient for worker-directors. (Summers 1982)

Finally, for worker-directors to communicate with workers effectively, there must be some sort of organizational structure in place for employees. In a unionized company, the union local can serve as the workers' organization. In non-union settings, complications arise over how to best form workers' organizations without running afoul of NLRA 8(a)(2) (see Liebman 2017 for more detail). Workers' councils could be prohibited from any discussion (and certainly bargaining) over the terms and conditions of employment: this is not their function, although, of course, this leaves non-unionized workers with no mechanism for collectively bargaining. The works councils should serve to provide a forum for worker directors to hear directly from the workforce, so they need to have some permanent form, procedures, and boundaries.

Workers are crucial stakeholders for the success of large corporations, the drivers of the U.S. economy. The economic model of shareholder primacy, in which shareholders (through financial intermediaries) solely elect directors to corporate boards, does not reflect the institutional factors that contribute to innovative enterprises and does not accurately reflect the role of shareholders in 21st century corporations. There is growing consensus that shareholder primacy should be replaced with a stakeholder theory of the corporation; one key element is to include worker representatives on U.S. corporate boards. Though such a policy reform will only be effective if it is enacted along with other reforms to U.S. industrial relations, and certainly faces political headwinds, worker representation on corporate boards is a key policy that can encourage innovation and sustainable prosperity in the 21st century.

Appendix: Table of Policy Proposals

	U.S. Range of Policy Options	Accountable Capitalism Act/ Corporate Accountability and Democracy Proposal	German Co-Determination Model
Number of Directors	⅓ (if decisions require supermajority) – ½	40%/ 45%	Parity/ Quasi-parity/ ⅓
Who Can Serve as Worker-Elected Director	Exclusively Employees/ Previous employees/ Union leadership	Undefined	Employees & Union Leadership
Who Counts as a Worker	Formal employees/ employees of subsidiaries/ misclassified independent contractors	Rulemaking by SEC and DOL to ensure elections are "fair and democratic"	
Redefining Director Fiduciary Duties	Expand fiduciary duty to include responsibility to all stakeholders/ Responsibility to best interests of the corporation	Balance pecuniary interests of shareholders with best interests of stakeholders, including employees & workforce, customers, community & societal factors	
Worker Organizations	Reform NLRA §8(a)(2)/ Institute worker organizations without management representation/ Employee free choice to establish works councils		Works Councils

From Shareholder Primacy to a Dual Majority Board

By Julie Battilana & Isabelle Ferreras[41]

From Shareholder Primacy to a Dual Majority Board

Julie Battilana & Isabelle Ferreras[41]

In the context of the knowledge and service-based economy, firms cannot operate without the joint investment of capital and labor, and their productivity is determined by how this cooperative investment is organized. While shareholders invest their capital, workers are the ones who invest their labor. Historically, shareholders have been the most salient type of investor, as the conflation of the word "investor" with "capital investor" attests. But the importance of the labor component of this joint investment has become more visible during the COVID-19 pandemic. Where the investment of labor has been hindered by necessary public health measures, production and distribution of goods and the provision of services has ground to a halt. The concept of "essential workers" has highlighted the absolute necessity of labor in ensuring the continuity and resilience of our societies.

A Corporate Governance Defect with Consequences

While American society has allowed corporations to serve as organizing vehicles for economic activity, the laws governing corporations have elevated the interests of capital investors at the expense of labor investors and society. Capital investors have a role in corporate governance, while labor does not have a seat at the table. Workers are not represented on boards, and they have no say in shareholder votes. Yet, workers are the *labor investors* without whom there would be no product or service sold.

Centering governance on capital investors, while excluding labor, is a structural defect that must be urgently remedied. This note is meant to discuss the consequences of the current situation, and to highlight a possible solution to the problem that deserves to be explored, studied, and debated.

Corporate boards serve as the legislative branch of firms and they are elected exclusively by shareholders. Concentrating such power in the hands of shareholders has unsurprisingly led many firms to excessively focus on profit and the short-term financial gains without systematically accounting for their impact on the well-being of their employees, the environment, and the broader society.[42] The results are devastating and widely documented: the stock market values of some of America's biggest corporations have been flourishing during the pandemic even as they have imposed the costs of coping with the pandemic onto labor, including uncompensated layoffs for some and forcing

41 This work is part of a memorandum prepared for the Clean Slate for Worker Power initiative developed by the Labor and Worklife Program at Harvard Law School. This work in progress has largely benefited from the input of Robert Fannion (Fellow, Berkeley Law School), Ewan McGaughey (King's College London), Kara Sheppard-Jones (research associate at Harvard), Leszek Krol (research associate at Harvard), and Alexandra Ubalijoro (research associate at Harvard). Julie Battilana is the Joseph C. Wilson Professor of Business Administration at Harvard Business School, the Alan L. Gleitsman Professor of Social Innovation at Harvard Kennedy School, and the Founder and Faculty Chair of the Harvard Social Innovation and Change Initiative. Isabelle Ferreras is a Senior Tenured Fellow of the Belgium National Fund for Scientific Research (FNRS), Full Professor at the University of Louvain (UCLouvain, Belgium), a Senior Research Associate of the Labor and Worklife Program at Harvard Law School, Director of the Class Technology & Society, and President of the Royal Academy of Sciences, Letters and Fine Arts of Belgium.

42 Isabelle Ferreras, Julie Battilana, and Dominique Méda (2020) *Le Manifeste Travail: Démocratiser, Démarchandiser, Dépolluer* Éditions du Seuil, Paris

others to risk disease or death as a condition of continued employment.[43] Forty-five out of the fifty largest U.S. companies have been profitable between April and September 2020, yet nearly half of these firms cut staff in 2020 and gave the bulk of profits to shareholders.[44]

"Forty-five out of the fifty largest U.S. companies have been profitable between April and September 2020, yet nearly half of these firms cut staff in 2020 and gave the bulk of profits to shareholders"

In August 2019, the Business Roundtable, whose membership includes the CEOs of most major U.S. corporations, recognized the limits and negative consequences of exclusively empowering capital investors. After decades of completely embracing shareholder primacy,[45] the Business Roundtable issued a statement rejecting the primacy of shareholders in favor of creating value for all stakeholders, including their customers, employees, and society at large. Yet this announcement has not led to significant change. In fact, recent research revealed that companies that signed the Business Roundtable statement were almost 20% more likely to fire their employees when the COVID-related economic contraction began in March and April 2020 than those that did not sign the statement, all the while further enriching their shareholders.[46]

Excluding labor investors from the corporate decision-making process ensures that the interests of labor investors will not be properly represented[47] and corporate decision-making will risk continuing to be driven by the short-term financial interests of shareholders with little connection to the firm as a productive and socially useful undertaking. The currently visible consequences of financially-driven corporate governance include rising levels of inequality, the destruction of the environment, and deteriorating employment prospects. Furthermore, the overwhelming focus on financial gains has endangered political democracy and constitutional government, as some firms have used their increasing power to influence government in any way that increases their profitability with no countervailing incentive to consider the consequences of their political activity for society as a whole.[48]

Moving Corporate Governance Towards Democracy

Measured either normatively or through contribution to productive processes, labor investors are *not* the "junior partner" of capital. They are an equal constituency of the firm, in need of enfranchisement and a coequal role in making its main decisions, including the selection of the CEO and strategic choices that will affect labor as much as capital investors and their respective returns on investment. *Labor investors* ought to have "the collective right to

---

43 See, for instance, the health and safety risks faced by workers in the meat and poultry industry in the early stages of the COVID-19 pandemic: Centers for Disease Control and Prevention, "Morbidity and Mortality Weekly Report July 10, 2020" vol. 69, no. 27, 887-892.

44 Douglas MacMillan, Peter Whoriskey, and Jonathan O'Connell, "American's Biggest Companies are Flourishing During the Pandemic and Putting Thousands of People Out of Work," Washington Post (December 16, 2020) https://www.washingtonpost.com/graphics/2020/business/50-biggest-companies-coronavirus-layoffs/

45 See, for example: The Business Roundtable, "Statement on Corporate Governance" (September 1997) https://cdn.theconversation.com/static_files/files/693/Statement_on_Corporate_Governance_Business-Roundtable-1997%281%29.pdf?1566830902

46 See research compiled by Tyler Wry referenced in: Jerry Useem, "Beware of Corporate Promises: When Firms Issue Statements of Support for Social Causes, They Don't Always Follow Through," The Atlantic (August 6, 2020) https://www.theatlantic.com/ideas/archive/2020/08/companies-stand-solidarity-are-licensing-themselves-discriminate/614947/

47 Julie Battilana and Tiziana Casciaro, *Power, for All: How It Really Works and Why It's Everyone's Business* Simon & Schuster, New York (forthcoming August 2021)

48 For more on how money shapes democratic political systems, see Cagé, Julia *The Price of Democracy: How Money Shapes Politics and What to Do About It* Harvard University Press, Cambridge, MA (2020)

validate or veto these decisions."[49] All workers should not only be able to vote for union representation to bargain over wages and working conditions that concern the entire industry, but also should be able to choose their representatives at the firm level so that they can participate in decision making about the life of the firm such as the choice of the CEO, what product and market strategies it should pursue, what to prioritize in times of crisis, and how profits are shared.

"...labor investors are not the 'junior partner' of capital."

"Collective bargaining" should involve the collective voice of workers, through their own chosen representatives, negotiating as equals not only over "mandatory subjects" such as wages and hours, but also over "managerial decisions," (i.e. the strategy of the firm). This industrial relations legacy interestingly meets the political history of democratic transitions. Democratization of political entities has been spurred historically by *bicameral moments,*[50] when the dominant group, which monopolized political rights based on ownership of property, was forced to share power with a second constituency, whose legitimacy to co-govern the joint entity could no longer be denied. The bicameral philosophical principle learned from the study of successful transitions from despotism to democratization was time and again on display when the constituency once dominated (e.g., the Plebs, the Commons, …workers) gained the right to collectively validate or veto the decisions of the entity that had previously been in the hands of its dominant constituency only (e.g., the Patricians, the King and Lords, …the shareholders).

A variety of models that enable employee representation at the board-level have been developed over the past century. In Germany, for instance, a system of codetermination creates legal requirements for worker participation at the Board-level that vary based on company size and industry.[51] In addition, nineteen of the thirty-one countries in the European Economic Area have legal requirements for board-level employee representation in some cases.[52] This movement toward workplace democracy is also part of a long-standing but neglected tradition in the United States: a 1919 law in Massachusetts enabling manufacturing companies to give their employees the opportunity to sit on their boards of directors represents the world's oldest codetermination law continuously in force.[53]

---

49 The basic intuition is affirmed in the Working Manifesto (see www.DemocratizingWork.org published in May 2020 and signed by more than 6,000 scholars, including Elizabeth Anderson, Dani Rodrik, Thomas Piketty, Katharina Pistor, Marshall Ganz, Joshua Cohen): "workers should get the right to collectively validate or veto the [firm's] decisions".

50 For more on bicameral moments as well as the concept of "labor investor," see: Ferreras, Isabelle *Firms as Political Entities. Saving Democracy through Economic Bicameralism* Cambridge University Press, Cambridge, U.K. (2017)

51 John Addison, *The Economics of Codetermination: Lessons from the German Experience* Palgrave, New York (2009)

52 While codetermination and other legal requirements for employee participation in governance represent an important development, extant models often ultimately prioritize capital investors over labor investors. In Nordic European countries, Germany, the Netherlands etc., employee representatives on the board constitute between one third to one half of the board members. In Germany, even at firms where 50 percent of Boards are made up of employees, the tiebreaking vote is held by a chairperson appointed by shareholders. Of the nineteen countries mentioned as legally requiring employee representation at the Board-level, five limit mandatory Board-level representation to state-owned, partially state-owned or formerly state-owned companies. For more details on the specifics of Board-level employee representation in different EEA countries, see: Videbæk Munkholm, Natalie "Board-Level Employee Representation in Europe: An Overview" Directorate General for Employment, Social Affairs, and Inclusion, European Union (2018) https://eu.eventscloud.com/file_uploads/e0bd9a01e363e66c18f92cf50aa88485_Munkholm_Final_EN.pdf. See also: www.worker-participation.eu

53 However, the ability to elect employees remains voluntary and is not enforced. For more information, see: McGaughey, Ewan "Democracy in America at Work: The History of Labor's Vote in Corporate Governance," Seattle University Law Review 42 (2019): 697–753. For the Massachusetts Law itself, see: https://malegislature.gov/Laws/GeneralLaws/PartI/TitleXXII/Chapter156/Section23

Designing a Dual Majority Board

The principle of requiring dual majorities is that majorities of *both* board members elected by the shareholders and those elected by workers are needed to ratify board decisions. In practice, dual majority boards would require two conditions to be met:

- **Total membership** of a firm's Board of Directors or equivalent governing body should be comprised of between 30% and 50% labor representatives, elected by the firm's workers.
- **A supermajority vote** should be required on any decision that directly and significantly affects workers, requiring support from the Board's labor representatives.[54]

Worker representatives, whatever their actual number on the corporate board, would form a labor college among which a majority of votes should be secured for any decision to be passed by the Board, as well as any decision made by shareholders directly, according to corporate law, which concerns merger or termination of the corporation.

Dual majority approval should apply, at minimum, to all strategic decisions that affect workers. This logically requires workers' majority support for all strategic decisions that rise to the level of a Board vote or the selection of key managers to whom decision-making is delegated.

54 This is based on the original proposition made in Sharon Block and Ben Sachs, *Clean Slate for Worker Power Report*, Harvard Labor and Worklife Program (January 2020) pp. 71-73 https://www.cleanslateworkerpower.org/

Coordination and Implementation

To help transfer worker knowledge and interests from the frontline to the board room, work councils at the production unit level are a valuable and time-tested tool in many capitalist economies. Work councils can enable workers' representatives and management regularly meet to address the many issues of governing the workplace. Work councils can coordinate with board-level worker representatives to ensure continuity in bringing worker insights to the Board[55]. Such a coordination mechanism empowers worker representatives with knowledge about the functioning of – and challenges faced by – the firm, and allows them to hold executives and managers accountable.[56]

It is also critical to select the right labor representatives. As shareholders enjoy a voting right to select the members of the Board, all labor investors should be able to do the same. To ensure proper coordination between the firm level and sectoral bargaining, at least some of the elected[57] representatives of labor investors should have affiliations with unions or labor associations present throughout the industry.

Finally, worker representatives should be trained in order to fulfill their duties as board members. Such training will be critical especially now that companies are being held accountable not only for their financial performance but also for their social and environmental impacts. All board members should, of course, be remunerated in a fair way for the work that they will accomplish.

There are cultural, and political challenges to achieving this evolution of the U.S. system of corporate governance, as implementing workers' representation on boards breaks with the norms and power hierarchies that have become dominant over the past decades. Yet this more democratic form of corporate governance should also feel familiar. It is, after all, more consistent with America's founding democratic values. Further, power sharing between capital and labor investors is necessary to ensure shared prosperity for all and not only for a wealthy minority.[58] Given the increased social unrest that results from economic and social inequality, it is in everyone's interest, including the rich and powerful, to bring about such a change.

---

55 See the proposals to set up workplace monitors and works councils at the floor level in: Sharon Block and Ben Sachs, *Clean Slate for Worker Power Report*, Harvard Labor and Worklife Program (January 2020) https://www.cleanslateworkerpower.org/

56 Addison, *The Economics of Codetermination*, pp 118, 144

57 Diversifying the ways to appoint the labor investors' representatives could be highly relevant, as we follow Hélène Landemore's work on the limit of elections, and the benefits of appointment by lot among pools of relevant groups or workers. See *Open Democracy* Princeton University Press (2020)

58 Battilana and Casciaro, *Power, for All*

Acknowledgments

These briefs are published as part of The Aspen Institute Business & Society Program's Ideas Lab on Worker Voice in Corporate Governance. The views expressed in these briefs are those of the authors alone and are intended to promote more dialogue about worker voice in the boardroom. We are deeply grateful to our Ideas Lab participants who generously shared time, grace and expertise over hours of dialogue with each other.

Julie Battilana
Professor of Business Administration,
Harvard Business School

Larry Beeferman
Fellow, Labor and Worklife Program at
Harvard Law School

David Berger
Partner, Wilson Sonsini Goodrich & Rosati

Sharon Block
Executive Director, Labor and Worklife Program
at Harvard Law School

Doug Chia
Fellow, Rutgers Center for Corporate
Law and Governance

Heather Slavkin Corzo
Director of Capital Markets Policy, AFL-CIO

Felicia Davis
Program Manager, Aspen Institute Business
& Society Program

Tiffany Ferguson
Program Manager, The Workers Lab

Isabelle Ferreras
Senior Research Associate, Harvard University
& Senior Tenured Fellow, Funds for Scientific
Research (FNRS) in Brussels, Belgium

José García
Program Officer, Future of Work(ers),
Ford Foundation

Michelle Greene
President Emeritus, Long-Term Stock Exchange

Jeremie Greer
Co-Founder and Executive Director,
Liberation in a Generation

Eric Horvath
Director of Capital Strategies, Common Future

Eddie Iny
Senior Advisor, United for Respect

Chris Jurgens
Director, Impact Investing and Reimagining
Capitalism, Omidyar Network

Rachel Korberg
Program Officer, Future of Work(ers),
Ford Foundation

Miguel Padró
Senior Program Manager, Aspen Institute
Business & Society Program

Lenore Palladino
Fellow, Roosevelt Institute; Assistant Professor
of Economics & Public Policy, UMass Amherst

Judy Samuelson
Executive Director, Aspen Institute Business
& Society Program

Erica Smiley
Executive Director, Jobs With Justice

Leo Strine, Jr.
Ret. Chief Justice, Delaware Supreme Court;
Of Counsel, Wachtell, Lipton, Rosen & Katz

Warren Valdmanis
Director, Two Sigma Impact

Rick Wartzman
Head of the KH Moon Center for a
Functioning Society

Jenny Weissbourd
Senior Project Manager, Aspen Institute Economic
Opportunities Program

Tracy Williams
Director, Reimagining Capitalism, Omidyar Network

The Aspen Institute Business & Society Program would like to thank the sponsor of this report for their support and funding:

OMIDYAR NETWORK