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Early Trends Provide Guidance for Required 10-K Human Capital Disclosures

Issue 8: 10 in 10

It has been more than 30 years since the U.S. Securities and Exchange Commission (SEC) has significantly revised any disclosure requirements relating to employees. But in August 2020, after considering comment letters from labor groups (and other groups), the SEC issued its final rule—Modernization of Regulation S-K—mandating human capital disclosures.

Previously, the regulations included only one item related to human capital: the number of employees. Now, public companies must disclose “human capital resources ... and any human capital measures or objectives that the company focuses on in managing the business,” to the extent such disclosures are material to an understanding of the business as part their Form 10-K, and other filings subject to Regulation S-K. Yet, the SEC did not articulate specific metrics for the new disclosure requirements—*so what does this mean?*

In determining what and when to disclose information, public companies will need to consider whether to include a qualitative objective and/or a quantitative measure in each area of human capital. Given the prescriptive nature of the new rules, companies currently have wide latitude in preparing their human capital disclosures. The lack of SEC guidance simultaneously presents challenges in discerning what human capital information should be included.

We have reviewed a sample of recent 10-K filings and identified a few trends which provide helpful insight for companies going forward.

First, most companies publish their human capital disclosures in the Description of Business found at the beginning of 10-Ks, while a few other companies provide a brief summary on human capital in their 10-Ks, and reference a much longer discussion in their proxy statement or other documents posted to the company’s website.



Second, most disclosures focus on the qualitative description of values, programs, and practices, while very few companies disclose actual metrics used to manage the business.

Third, most filings focus on at least a handful of the following human capital areas:

- Extensive employee headcount data (e.g., geography, gender, ethnicity);
- Diversity and inclusion initiatives;
- Talent development and training;
- Competitive pay and benefits;
- Company culture and core values;
- Employee engagement through surveys;
- Tenure, promotion, and turnover;
- Health, safety, and wellness initiatives; and
- Pay equity

From these initial filings, we see that the initial human capital disclosures are highly individualized and varied. We anticipate that as the government continues to provide additional guidance, and the Biden Administration SEC takes over, the content of these disclosures will evolve.

In the meantime, it will be important for companies to consider the implications of disclosing or omitting certain human capital categories—including information about their international workforces—in their own Form 10-K disclosures and how that might impact litigation.

Specifically, we have already seen several shareholder derivative lawsuits alleging that companies' annual proxy statements contain false or misleading claims by promoting a commitment to diversity that is not reflected in their boards and executive management teams. Given the lack of guidance here, it is certainly possible that similar lawsuits may arise based on the information provided or omitted in the human capital disclosures.

Finally, a coalition of organized labor unions spearheaded the addition of these disclosures to the Form 10-K. We also anticipate that the union coalition has thoughts on what should be included—particularly around restructurings, compensation, benefits, and safety—that may significantly differ from corporate America's interpretation. How that difference of opinion will play out remains to be seen in litigation and enforcement efforts.



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