Seyfarth

# 2023 Human Capital Disclosure Report: In Betwixt and Between

Seyfarth Shaw LLP

# Welcome to our third annual Human Capital Disclosure Report.

As our prior Reports have done, this year's report offers general and specific industry insights of SEC-required human capital management (HCM) disclosures. Our "Employers' Perspective" touches upon discrete HCM topics that are either being challenged or represent a rising tide that are poised to reshape key elements of managing talent while offering opportunities and creating new risks. Finally, we provide a look ahead.

As our Report shows, human capital covers a myriad of topics under the ESG (environmental, social, and governance) umbrella, chief among them is diversity, equity and inclusion (DEI). Since 2020 when ESG rushed into the mainstream and social events placed a renewed focus on DEI, both HCM broadly and DEI specifically became intertwined with an ESG strategy. In addition, during the last three years, depending on where a company sits within the ESG ecosystem, ESG has moved from somewhat of a darling term that advances profit and purpose to a shunned term with potentially no meaning at all.

In 2023, political headwinds, state laws and court challenges sought to deter ESG—and most notably—DEI efforts. This was juxtaposed with global regulators making strides to advance ESG accountability and transparency with mandatory requirements that have global reach, such as the EU Corporate Sustainability Reporting Directive (EU CSRD), which can create particular challenges for multinational companies. The EU CSRD reaches many non-EU companies with extensive disclosure across the ESG landscape, including on HCM matters.

**Global regulators are making strides to advance ESG accountability and transparency with mandatory requirements that have global reach.**

In light of this, we found many of our clients and the marketplace in betwixt and between triggering a step back to reassess and realign with their purpose—particularly as businesses continued to traverse inflationary concerns and significant geopolitical events. What we did not see, however, was a willingness to change course on ESG and related HCM efforts. This reflected a movement from idealism to realism and a look beyond a term that can sometimes be seen as a political agenda versus a framework that offers ways to build resiliency among stakeholders that is relevant to the business.

2023 also did not reflect a holding back on SEC disclosures, which are focused on what is material for the investor audience. As a refresher, the SEC requires publicly listed companies to provide:

> (ii) A description of the registrant's human capital resources, including the number of persons employed by the registrant, and any human capital measures or objectives that the registrant focuses on in managing the business—such as, depending on the nature of the registrant's business and workforce, measures or objectives that address the development, attraction, and retention of personnel.[1]

With a principles-based approach to disclosures, companies continued to exercise their discretion as to what was material and relevant to their business. With this background, we begin our report with general insights, followed by our specific industry insights.

## Year Three Human Capital Disclosures: Seyfarth Insights

This year, we again reviewed the HCM disclosures of 200 companies across the following industries (using Lexis Securities Mosaic industry categories):

- Agriculture & Food
- Construction & Real Estate
- Energy & Natural Resources (including Utilities)
- Financial & Insurance
- Health Care & Pharmaceuticals
- Industrial & Manufacturing
- Retail
- Services
- Technology & Telecommunications
- Transportation

This analysis covers 20 S&P 500 companies in each industry with revenue between approximately $6.4M-$573B. We reviewed the Human Capital Management sections of the companies' 2023 10-Ks.

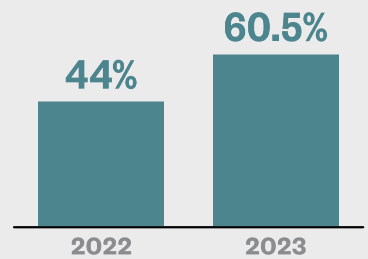
### General Insights

Publicly traded companies' 2023 HCM disclosures continued to vary widely from company to company and across industries. We've included a chart at the end of the document reflecting the number of HCM disclosures referencing various categories by industry. We also identified the following general trends and noteworthy items.

- **Focus on Employee Experience and Culture:** In what we expect to be an effort to drive employee recruitment and retention, we saw companies looking inward as to how they can enhance the employee experience through culture. We saw an increase in the number of HCM disclosures we reviewed specifically referencing culture up an average of 82.5% across industries.

**82.5%** Average increase across industries of HCM disclosures specifically referencing culture

- **Continued Focus on DEI:** Despite recent Supreme Court decisions raising issues about factoring race into college admissions decisions, we continued to see most HCM disclosures include reference to DEI efforts with 93.5% of the HCM disclosures we reviewed across industries including references to DEI principles. The number of companies including more detailed statistics related to diversity and year-over-year comparisons continued to increase with the number of companies that included demographics reporting increasing to 60.5% across industries (up from 44% in 2021).



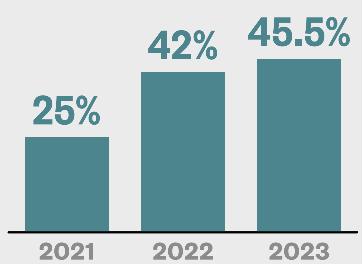

DEI demographics reporting across all industries from 2021 to 2013.

- **Continued Focus on Pay Equity:** While not at the same level of DEI references, we saw consistent numbers in the references to pay equity reviews in the HCM disclosures we reviewed—with 28.5% across all categories mentioning pay equity efforts—and most industries reflecting the same or increased references to pay equity reviews.

- **Benefits are Key:** Perhaps not surprisingly, many of the HCM disclosures we reviewed focused on recruitment and retention efforts as a critical part of their HCM strategy. As part of that effort, employee benefits continue to play a front and center role. In addition to the compensation element, which is impacted by the pay equity analyses noted above, we saw many references to the importance of the company's employee benefits package. These references often included mention of standard employee benefit programs, such as retirement plans and medical benefits, but many also referenced additional benefits offerings, such as mental health and well-being benefits, mindfulness tools, caregiver (caring for infants as well as disabled or elderly family members), and family planning and fertility benefits.

- **Employee Engagement and Development:** We also saw many HCM disclosures focus on employee engagement, noting engagement surveys, and other ways to assist employees with their professional development and general education. Many disclosures referenced remote and hybrid work options reflecting a continued desire for flexibility within the workforce. Companies also seemed focused on developing their talent pipeline, as another tool for retention and health of the business. We saw references to a variety of course offerings and programs, including traditional coursework from universities (some virtual) as well as mentorship and sponsorship programs. We also noted references to more discreet topics such as mindfulness, financial literacy, and English as a Second Language courses.

- **Board Oversight Up:** Overall, HCM continues to be an important issue across industries. This importance is highlighted by the fact that the number of references to board level oversight of human capital issues in the HCM disclosures we reviewed (regardless of industry) continued to increase with an average of 45.5% reporting board oversight in this area, up from 25% in 2021 and 42% in 2022.




Continued increase in board oversight in all industries from 2021 to 2023.

## Specific Industry Group Insights

Seyfarth's review also reveals trends in HCM disclosures within particular industry groups.

- **Agriculture & Food:** We once again saw a focus in discussions of safety, especially for companies with a substantial number of employees in a high-risk environment. Companies with fewer high-risk employees tended to discuss instead employee health and well-being more generally. Many disclosures touted a wide variety of learning opportunities, especially virtual learning. Some disclosures included discussion of other learning programs, such as financial literacy or English as a Second Language classes. Finally, disclosures emphasized DEI statistics, with many companies setting forth aspirations to have certain percentages of female or diverse employees by certain dates, especially in leadership or management roles.

- **Construction & Real Estate:** The largest areas of focus for these industries was DEI, recruitment, talent development and training, and employee benefits. Nearly all of the HCM disclosures we reviewed discussed DEI and nearly half of these disclosures included specific descriptions of ongoing or future DEI related goals/initiatives. Similarly about 75% of the disclosures mentioned recruitment, training, and talent development, with about half of the disclosures including detail descriptions of ongoing programs. About 75% of the disclosures also described benefits provided to employees, including health care, 401k, commuter benefits, tuition reimbursement, mental health and home, auto, and pet insurance, as well as others. Less than half of the disclosures included breakdowns of workforce demographics and those that did mainly focused only on gender/race. None of the disclosures discussed fair wages, and very few discussed turnover rates or safety statistics.

- **Energy & Natural Resources (including Utilities):** HCM disclosures in this industry group reflect common themes of safety, employee training, and compensation and benefits. These disclosures vary wildly in terms of the level of detail, the metrics, and the strategies they use to communicate their HCM performance and priorities and suggest a generally more conservative approach to proactively disclosing HCM data. DEI is overall the least developed area of the HCM disclosures for this industry, with some companies reporting on data of gender and racial diversity (some broken down by various levels throughout the organization), while many others only referenced their EEO-1 reporting or recognition by third-party organizations without providing specific data. Companies in this group tended to provide more information and metrics related to other ESG metrics as well, such as their emissions and renewable energy goals, than companies in other industries, reflecting higher stakeholder expectations and regulatory pressures on their industry.

- **Financial & Insurance:** The HCM disclosures for this industry generally reflect bold and progressive steps in their commitment and support for employees. HCM disclosures for this industry group reflected an increase in voluntary pay equity assessments and adjustments where unaccounted discrepancies were identified. The disclosures also showed many companies continuing to support remote and hybrid work arrangements citing benefits to health, safety, work-life balance, and flexibility for employees. We saw references to expanded parental and caregiver leave benefits, in many cases, equalizing the amount of paid leave between all caregivers in the household. The majority of companies analyzed maintain talent development programs at the identification stage in recruiting through mid to senior level associates. These companies also reported a focus on employee education ranging from self-guided and web-based development programs, to courses offered via partnerships with third-party universities and organizations. This group also demonstrated a general heightened focus on diverse recruitment and retention through hiring, pay equity analyses/adjustment, mentorship, sponsorship, and development.

- **Health Care & Pharmaceuticals:** HCM disclosures for this industry largely followed trends consistent with past years. As in years past, missions and values were discussed in great detail, focusing on qualitative efforts to build workplace culture. Nearly all employers provided statistics on the geographic location of the workforce, including—in many cases—full-time/part-time breakdown. Statistics were used to offer insights on the breakdown of female and male headcount. However, as related to race, granularity of the statistics were lacking, often offering a general percentage of employees who identify as a minority. While potentially predictable for employers engaged in health care or therapy development, benefits seems to be growing to include more wide-ranging employee needs, such as remote work, family care support, fertility care, and—consistent with years past—mental health and mindfulness tools. Consistent with the reduced focus on COVID-19 more broadly, discussion of COVID-19 was generally incorporated into a broader discussion of health, safety, and well-being, and in some cases, was not discussed at all.

- **Industrial & Manufacturing:** The main focus of the reports for this industry was DEI with health and safety as a close second. 85% of the HCM disclosures we reviewed for this industry group provided specific examples of ongoing DEI efforts, with 50% providing some sort of breakdown of the demographics of their workforce and 35% referencing specific diversity goals for the future. Additionally, 75% of the HCM disclosures we reviewed for this group described specific workplace health and safety measures and 30% provided safety statistics related to injuries, incidents, and accidents. Recruitment, talent development, and training were also an important focus in 70% of the HCM disclosures we reviewed in this industry.

- **Retail:** The retail industry HCM disclosures we reviewed were more narrow than those of other sectors. Almost all the disclosures we reviewed in this area covered health and safety of employees, invariably a result of the physical demands on employees. With one or two exceptions work-force demographic statistics were generally absent, with little detail, even anecdotally regarding workforce demographics. Similarly, recruitment was not discussed in great detail, while workforce training and development continued to be a more prominent feature across the HCM disclosures we reviewed. Some discussion of unionization and collective bargaining arrangements was provided, but usually in only the most general terms. Notably, the HCM disclosures we reviewed did reveal a consistent focus on community engagement and partnerships with colleges and universities, for the creation of management training curriculum and other programs to encourage the development of workplace-ready graduates.

- **Services:** HCM disclosures we reviewed in this industry increased their use of statistics over last year, but a substantial minority still did not include any meaningful breakdown of the employer's demographics or other data. Many companies disclosed the creation or existence of employee resource groups or other affinity groups. Companies also touted their talent recruitment and development efforts, with many discussing online learning platforms, mentorship programs, tuition reimbursement or other external learning programs. While only a few companies referenced workplace safety, most companies disclosed health and wellness initiatives, both for physical and mental health of their employees. Many companies disclosed the use of employee engagement surveys, often touting the high response rates for these surveys.

- **Technology & Telecommunications:** Common themes in the HCM disclosures we reviewed in the technology sector include the importance of attracting, retaining, and developing talent; commitment to DEI; and investment in learning and development. The HCM disclosures we reviewed in this space were more likely to connect their DEI activities to talent acquisition and retention objectives, and typically listed multiple community engagement initiatives related to social justice. Overall, based on the HCM disclosures we reviewed, DEI appears to be the most developed area of the HCM disclosures for this industry. The majority of these disclosures provide comparatively detailed statistics on the gender and racial/ethnic composition of their workforces, albeit limited to their US-based workforce. We saw references to more specific goals and achievements for female and minority representation, multicountry pay parity initiatives, and references to employee engagement surveys. Perhaps, not surprisingly, a number of HCM disclosures we reviewed in this group referenced the companies' innovation and digital transformation efforts and initiatives, specifically in terms of employee learning, development, and education to foster a culture of continuous learning and improvement, as well as to enable their employees to adapt to changing technologies, customer needs, and market conditions.

- **Transportation:** Likely due to the surge in demand in the transportation & logistics industry due to e-commerce, recruitment, talent development, retention, and pipeline building appear to be top of mind for companies based on the HCM disclosures we reviewed. Again, we saw references to companies partnering with universities and third-party organizations, in addition to building out bespoke internal development platforms in an effort to retain and upskill their talent. Relatedly, building diverse pipelines appears to continue to be important with race- and gender-driven onboarding and leadership training of increasing prominence in these disclosures and yielding reportedly positive developments in diverse pipeline growth. We also saw heightened efforts to increase accessibility throughout the industry with employers leveraging technology and metrics-driven assessments in their people and safety strategies. Some companies in this group reported, leadership and management incentive structures that are, in part, tied to performance against safety and talent benchmarks and references to special employee bonus programs allocated for safe driving and operation.

## The Employers' Perspective

Employers are increasingly adopting ESG governance frameworks that involve multiple board committees or the full board. This approach only makes sense, as ESG has entered the mainstream and has become a target of conservative politicos. And with the 2024 election looming, it is a near certainty that critiques of employer's ESG efforts will continue to grow in volume.

The heightened scrutiny on ESG broadly and the ever-expanding (and sometimes conflicting) national and international reporting obligations that have been put in place present new challenges for employers. From attacks on DEI initiatives to the meteoric rise of AI capabilities in the workplace, employers confronted a host of unprecedented challenges in 2023. And with the resurgence of the power and influence of labor unions, the continued battles being fought over remote work as well as the constant struggle to recruit and retain top talent, an already complex worker-employer dynamic will likely only become harder to navigate. Of course, overlaying all of this is the pending 2024 election cycle and its corresponding strain on the workforce.

As we rush headlong into the year ahead, we offer the following perspectives:

- **The Shifting DEI Landscape:** DEI initiatives in the workplace faced significant pushback from conservative politicians and other third party actors in 2023. In broad strokes, these groups contend that DEI programs ultimately discriminate (inadvertently or otherwise) against members of majority groups, particularly in hiring and promotion practices. This line of thinking has spawned lawsuits where individuals claim they have been unfairly disadvantaged due to their race, gender, or other majority group characteristics. In doing so, private litigants have alleged violations of Section 1981; Titles VII, VI, and IX; state common/statutory law; the Securities Exchange Act; and the Fifth and Fourteenth Amendments. Courts have been receptive to some of those challenges (e.g., some cases have resulted in the imposition of a temporary injunction, while others have proceeded past the initial pleading stage). Because of the prevalence of this litigation and the wide range of outcomes, employers have had to think critically about whether to scale back or rephrase DEI-centric policies, practices, and initiatives.

  Despite the uncertain legal landscape surrounding DEI, prospective employees—particularly Millennials and Gen Z—consider these programs table-stakes. The decision to scale back on (or jettison) DEI initiatives then very well might harm employers in their search for top talent. This tension will almost certainly continue to ratchet up as we inch closer to the November presidential elections; we expect the conversation around the state of DEI to grow louder as the year progresses.

  For these reasons, employers should engage (or continue to engage) in a meaningful risk calculus now regarding whether and how to adjust their current DEI initiatives. Questions from politicians are one thing; a potentially meritorious lawsuit is quite another.

- **The Rise of AI:** A little over a year ago, ChatGPT was introduced to the world, with promises that AI would revolutionize the way that employers do business and employees do their work. With limited exceptions, its growth—and its use by employers to source, recruit, and hire talent—has gone largely unchecked to date. From an ESG perspective, and depending on the business, AI can revolutionize the business model and it can be used as a tool to enhance and report on facets of an ESG strategy. When it comes to HCM, the use of AI in recruiting and hiring decisions carries risks related to inherent bias (as well as fairness), and should be considered carefully. In this regard, given both the opportunity and risks AI can present, a board's understanding of the ways in which AI is used in an HCM strategy is important to exercising its oversight duties.

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Further to that point, AI systems, including machine learning algorithms, are only as unbiased as the data they are trained on. If the historical data used to train these systems contain biases—such as gender, racial, or age biases—the AI will likely perpetuate and even amplify these biases in its decision-making. This can lead to discriminatory practices in hiring, where certain groups of candidates are unfairly favored or disadvantaged, potentially violating anti-discrimination laws and undermining diversity and inclusion efforts in the workplace. Moreover, AI algorithms can develop subtle and complex forms of bias that are hard to detect and correct, such as biases against certain educational backgrounds or career paths, further complicating the issue.

As more and more employers begin to look at AI as a tool in the recruitment toolbox, regulators and government agencies have begun to scrutinize those practices. The Equal Employment Opportunity Commission, for example, seems laser-focused on the possible disparate impact that may arise from AI-driven recruitment and hiring practices. Meanwhile, the US Government has held several hearings on the potential pitfalls stemming from the integration of AI into the workplace, inclusive of corporate espionage and misappropriation of trade secrets.

On the other hand, these advances in technology are here to stay. In many industries, moreover, the use of AI has become necessary to tread water, and employers are facing increasing external pressure to deploy these tools to demonstrate their technical know-how. As this technology continues to proliferate, employers will continue to face challenges regarding how to effectively implement AI-tools while staying on the right side of the anticipated regulatory landscape.

- **The Resurgence of Organized Labor:** One of the hallmark priorities of President Biden's administration has been to increase the power and political relevance of labor unions. By and large, the President has succeeded in this goal. Indeed, unions made their presences known in 2023; the Teamsters and the United Auto Workers achieved significant gains at the bargaining table by employing novel and headline-grabbing strategies, inclusive of strikes and strike threats. These strikes were backed by the President, and a large majority of voters supported the strikers, too.

  Unions and their supporters have also exerted significant pressure on publicly traded employers through the use of shareholder proposals. Many of these proposals, moreover, have begun to shift into dominant ESG topics that address how organizations manage their workforces. Over the past year, activist shareholders submitted a slew of pro-labor proposals, including asking organizations to refrain from opposing organizing campaigns or foregoing secret ballot elections altogether in favor of voluntarily recognizing a labor union upon a showing of majority status. Another type of proposal requires submission to a third-party audit of labor practices; these proposals shed no light on how the audit would work in practice, what entity might conduct it, and the scope of the anticipated work.

  We expect these sorts of proposals to become more prevalent in 2024. In combination with the favorable political climate, employers would do well to plot out a fulsome (and lawful) labor relations strategy, to include whether and how to respond to shareholder proposals on the one hand and internal labor unrest, on the other.

- **Whither Remote Work:** At this point of the pandemic, it is clear to most employers that remote work in some form is here to stay. Over the past year, employers took myriad approaches to remote work, with some adopting a "work from anywhere" model, and others requiring in-person attendance three (or more) times per week. Each of these approaches presents opportunities: indeed, employers that have instituted some form of a "return-to-office" mandate have reported the benefits of increased collaboration and employee engagement.

  That said, return-to-office employers have also expressed struggles with recruitment and retention. This is particularly the case with respect to recruitment and retention of women and minority caregivers, who came to depend on the ability to work flexibly during the pandemic.

Whether these competing priorities—recruitment and retention of women and minorities on the one hand, and the need for collaboration and face-to-face interaction on the other—can be reconciled will remain a challenge to employers as we move into 2024.

## Looking Ahead in 2024...

As we embark on the 2024 proxy season, all eyes will be on the SEC's regulatory agenda that it published in December 2023, highlighting its priority to issue further HCM guidance. In September 2023, the SEC's Investor Advisory Committee (IAC) issued its recommendations[2] for more prescriptive rules in upcoming guidance. Given the broad ambit of the current rule, the IAC cited inconsistent information that does not allow for reliable comparisons.

As has been predicted, the recommendations are focused on more prescriptive data elements that include:

- The number of people employed, identified by full-time, part-time, and contingent workers.
- Workforce demographic data sufficient to allow investors to understand the company's efforts to access and develop new sources of talent and to evaluate the effectiveness of these efforts.
- Turnover or comparable workforce stability metrics.
- Total cost of the company's labor, broken down into major components of compensation.

The IAC also recommends that the Management Discussion & Analysis include narratives on how the company's labor practices, compensation incentives, and staffing fit within the broader firm strategy. The IAC expressed a view that human capital is unlikely fully priced in the market despite research that shows companies with effective human capital management perform better. The balance between a principles-based approach and a more prescriptive approach is always debatable in terms of its usefulness to investors. However, in many ways, this view reflects the heart of why ESG made a splash in 2020 as the view focuses on transparency and accountability on a company's intangible assets with an expectation that the appropriate investments will foster a resilient and sustainable business. Talent is central to this view.

As we look ahead, we expect many of the insights and trends we saw last year will continue in this upcoming proxy season as we await further guidance. As in years past, however, the more fulsome story of HCM strategy and approach will be seen in companies' ESG reports and in disclosures responsive to global mandatory guidance.

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[1] SEC, *Final Rule: Modernization of Regulation S-K Items* 101, 103 and 105 (August 26, 2020) at 125, available here: https://www.sec.gov/rules/final/2020/33-10825.pdf.

[2] https://www.sec.gov/files/spotlight/iac/20230921-recommendation-regarding-hcm.pdf

# Human Capital Management Report Mentions

| | Agriculture & Food | Construction & Real Estate | Energy & Natural Resources (incl Utilities) | Financial & Insurance | Healthcare & Pharma | Industrial & Manufacturing | Retail | Services | Technology & Telecom | Transportation |
|---|---|---|---|---|---|---|---|---|---|---|
| **COVID-19** | 30% | 30% | 45% | 35% | 60% | 40% | 35% | 40% | 35% | 35% |
| **Culture** | 100% | 70% | 95% | 80% | 55% | 90% | 40% | 100% | 95% | 100% |
| **Demographics** | 65% | 35% | 85% | 75% | 80% | 50% | 15% | 45% | 75% | 80% |
| **Diversity and Inclusion** | 100% | 85% | 95% | 100% | 95% | 90% | 95% | 95% | 95% | 85% |
| **Employee Health and Safety** | 90% | 70% | 95% | 70% | 90% | 80% | 45% | 85% | 75% | 80% |
| **Initiatives** | 90% | 65% | 100% | 95% | 5% | 90% | 0% | 100% | 95% | 100% |
| **Pay Equity** | 40% | 15% | 20% | 45% | 45% | 15% | 15% | 35% | 40% | 15% |
| **Recruiting and Retention** | 80% | 90% | 80% | 95% | 50% | 95% | 35% | 65% | 90% | 70% |
| **Talent Development and Management** | 90% | 95% | 95% | 100% | 85% | 90% | 90% | 95% | 100% | 85% |
| **Did it mention the Board or a Board committee as having oversight of human capital?** | 60% | 45% | 75% | 50% | 25% | 50% | 30% | 50% | 30% | 40% |

# Meet the Authors

All authors of the 2023 Human Capital Management Disclosure Report are members of Seyfarth's Impact & ESG practice group.


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