BENEFIT CORPORATIONS AND IMPLICATIONS FOR EMPLOYEE WELFARE

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Abstract

The rise of benefit corporation form in the United States has come with promises that the social mission focus of these entities will generate positive spillovers for their employees. For example, benefit corporations are intended to provide greater attention to non-owner stakeholders, such as employees and employee treatment is explicitly part of the B Corp certification regime. However, as Benefit Corporations are formed and mature as organizations it remains to be seen if these entities provide an ideal vehicle for protecting and promoting employee interests when compared to traditional corporate structures. This paper first discusses the impetus for the benefit corporation in the context of corporate governance and the development of corporate social responsibility theories. It then discusses various trends in the U.S. employment environment and examines the supposed virtues of benefit corporations to promote employee welfare and protection, worker empowerment and voice, and other policy interests.

Paper Outline

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INTRODUCTION

The persistent conundrum for social entrepreneurs has been how to successfully marry two seemingly divergent concepts: the efficiency and profit producing aspects of a successful business and the mission-driven, society-enhancing aspects of successful nonprofit entities. Not only do these interests often diverge, but social entrepreneurs recognize that the social goals and the profit goals of a social enterprise can sometimes conflict and, as such, there has been a concerted effort to develop a series of hybrid legal entities to remove or otherwise neutralize this

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potential conflict.1 Thanks to the work of social entrepreneurship advocates over the last few years, social entrepreneurs looking for an ideal corporate legal form to accomplish their goals for bettering society now have several options for how to structure their organizations. These have ranged from the usual nonprofit or for-profit business forms, such as the traditional corporation, partnership, and limited liability company, to new forms, including the low-profit limited liability company (“L3C”). Importantly, since 2010 states across the country have begun adopting legislation that allows for a new type of corporate legal form: the benefit corporation.2

The justification for this new form has essentially been that the existing options for incorporation or the state law safeguards, such as constituency statutes, are inadequate corporate vessels to allow for a business and legal form that can raise capital, generate profits, and emphasize broad stakeholder interests alongside of shareholder interests.3 Not surprisingly with the advent of brand new options for incorporation, there remains an active discussion among practitioners4 and in the academic literature5 and as to whether this legal corporate form is the

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1 See Dana Brakman Reiser, Benefit Corporations – A Sustainable Form of Organization?, 46 WAKE FOREST L. REV. 591, 591 (2011). Professor Reiser sums up the tension this way:

> Founders of social enterprises believe profits and social good can be produced in tandem and wish to form organizations that will pursue these dual missions. They will, however, encounter obstacles to articulating and enforcing such dual missions if they adopt either a traditional nonprofit or for-profit form of organization. Nonprofit forms bar profit distribution and for-profit forms will create practical, if not legal, pressure to favor profit maximization over social good when the two come into conflict. And these two imperatives will certainly, at times, conflict.

2 Id. (citations omitted).

3 Id. at 7-14. Even the legal advocates for the benefit corporation acknowledge that the concerns of mission-driven business leaders that over time investors interests will “diverge…from the social mission of the company” may be based in fear: “Whatever the letter of the law, these fears, combined with both the prevailing business culture and advice of counsel about the risk of litigation if one fails to maximize shareholder value, have a chilling effect on the corporate behavior as it relates to pursuit of a social mission.” Id. at 6.

4 See, e.g., Mark A. Underberg, Benefit Corporations vs. “Regular” Corporations: A Harmful Dichotomy, HLS FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION (May 13, 2012), available at http://corpgov.law.harvard.edu/2012/05/13/benefit-corporations-vs-regular-corporations-a-harmful-dichotomy/. For example, some maintain that “viewed from a broader corporate governance perspective, the B Corp initiative—however well-intentioned—has troubling implications.” More directly, it may be that,

> The problem is that its primary rationale rests on the mistaken, though widely-held, premise that existing law prevents boards of directors from considering the impact of corporate decisions on other stakeholders, the environment or society at large. This crabbed view of directorial fiduciary duties perpetuates the unfortunate misconception that existing law compels companies to single-mindedly maximize profits and share price, and in so doing undermines the very values that corporate governance advocates should seek to promote: responsible, sustainable corporate decision-making by companies of any stripe.

best option for attaining positive social goals through business activity.⁶ In particular, there has been criticism asserting that the expanded duties that are required by benefit corporations will be difficult for managers and boards to implement.⁷

Yet one obvious benefit of a benefit corporation is that the entity is explicitly designed to take into account the interests of non-owner stakeholders, such as employees and other groups.⁸ In terms of this accountability to non-owners (i.e., stakeholders other than shareholders) the Benefit Corporation Model Legislation makes the consideration of both stakeholder and shareholders interests an explicit duty of the company’s directors.⁹

Aside from the debate over the real and enduring merit of benefit corporations and the need for the new legal format to protect and foster social entrepreneurship, there are other questions about whether benefit corporations can further deliver on the promise to have advantages for employees. In other words, do these corporations have superior benefits for a specific key stakeholder group—namely employees? This and other emerging questions about the likely impact of benefit corporations on employee welfare are at the center of this paper’s exploration of the issues.

Much of the focus thus far in the literature on benefit corporations is on the institutionalization of social entrepreneur’s beyond-the-bottom-line goals and ethos in a business legal format. This paper, in contrast, focuses on the potential impact of benefit corporations on the welfare of employee stakeholders. To begin this investigation, in Part I of the paper I summarize the relevant background and justification for the state-authorized benefit corporation movement and as well as the closely related concept of certified B Corps under the B Lab certification regime. In addition, Part I briefly discusses the basic debate between stakeholder and shareholder theory advocates and arguments concerning corporate social responsibility (CSR). Next, Part II briefly examines the evolving nature of employment and the changing workplace in the United States to establish the context for the state of employee-employer relations generally. Part III provides a critical look at the benefit corporation model from the perspective of maximizing employee-stakeholder interests. This section focuses on the issues of employee benefit enforcement proceedings as a possible mechanism for protecting employee interests, in addition to other attributes of the benefit corporation model such as the third-party certification process, employee voice, and positive branding to attract talented employees. A brief Conclusion reflects on the previous discussions and ends the paper.

I. Benefit Corporations and the Social Responsibility Context

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⁶ See, e.g., Kate Cooney, Mission Control: Examining the Institutionalization of New Legal Forms for Social Enterprise in Different Strategic Action Fields, in Social Enterprises: An Organizational Perspective (Benjamin Gidron & Yeheskel Hasenfeld, eds.) (discussing benefit corporations, L3Cs, and the UK community interests company) (the new legal forms “are explicitly designed to more readily support a blending of business and social goals” [and all attempt] “to address the two big constrains to social business hybrid activity…namely, the narrow conception of stakeholder rights in traditional for-profits and the constraints on attracting capital in traditional nonprofits.”). Id. at 200.


⁸ See, e.g., Clark, et al., supra note 2 at 17 (discussing that the statutes, “serve[] to protect against the presumption that financial interests of the corporation take precedence over the public benefit purposes, which maximizes the benefit corporation’s flexibility in corporate decision-making”).

⁹ Id. at 16-17, citing Benefit Corporation Model Legislation § 301(a)(1).
In order to better understand the place of employee interests within the benefit corporation model of governance it is useful to first examine the impetus for reform that led to the new legal form. In addition, the second section of this Part places the search for a new legal option for social entrepreneurs in the context of the longstanding corporate social responsibility debate in the United States.

A. Background on the Benefit Corporation Movement

Benefit corporations have their origin in concerns that the positive results of the rigor and discipline of business efficiency and profit generation is in conflict with the mission-driven decision making and stakeholder considerations of nonprofit organizations. In the last few decades it became clear that harnessing business techniques and even attracting traditional investors to achieve social goals could lead to positive outcomes beyond what traditional nonprofit and government models could reliably produce.

While charitable donations emanating from wealthy patrons has long been an important source of funding for social missions, business minded individuals who wanted to use their commercial skills to better society began to experiment with variations of the existing business models. These so-called social entrepreneurs want to solve societal problems using business-focused techniques. Accordingly, “social entrepreneurs believe social good can be produced along with profits and desire hybrid forms of organization to smooth a single enterprise’s path to realizing both goals.”

In order to achieve this mix of business and social goals, several hybrid legal formats have been proposed and, in many cases, adopted into state law around the United States. In only a few short years five types of “blended” or hybrid entities have been adopted in various jurisdictions. The benefit corporation, first enacted in Maryland in 2010, has now been adopted by nearly 30 states with over a dozen more states considering draft legislation to authorize benefit corporations.

The efforts to promote the passage of the Benefit Corporation Model Legislation are spearheaded by the nonprofit B Lab, which began its efforts in 2006. The model legislation

11 Reiser, supra note 1, at 591.
12 See Murray, Choose Your Own Master, supra note 10 at 4-5 (mentioning states adopting legislation allowing low-profit limited liability company (“L3C”) and benefit corporations, as well as states with the similar benefit liability company statute (“BLLC”), flexible purpose corporation statute (“FPC”), or a social purpose corporation (“SPC”).
13 See Reiser, supra note 1, at 594.
14 See Benefit Corp Information Center, State by State Legislative Status http://www.benefitcorp.net/state-by-state-legislative-status (a B Lab sponsored website cataloging benefit corporation information, including a tally of the adopting states and the model legislation promoted by B Lab and its supporters).
15 See Benefit Corp Information Center, Powered by B Lab (one of B Labs three goals is “promoting legislation creating a new corporate form—the benefit corporation—that meets higher standards of corporate purpose, accountability, and transparency.”).
includes a third party standard provision and B Lab certification is the leader among numerous available certification regimes. Essentially, the third party standard requirement for benefit corporations is intended to serve a transparency and accountability function to ensure that the entities are demonstrably pursuing their stated mission-driven ideals.

Notably, corporate entities—including traditional for-profit corporations and limited liability companies and L3Cs—are all eligible for B Lab’s extensive B Corp certification process, and not just the formally state-level incorporated benefit corporations. To receive the B Lab certification, an entity must be a corporate entity (i.e., not a sole proprietorship or a nonprofit) and either be a benefit corporation or amend its articles of incorporation to explicitly adopt an expanded set of duties to consider its social mission and stakeholder interests in addition to the promoting shareholder interests.

The social purpose embedded in the model of either a benefit corporation or a certified B Corp, by design, also has implications for internal stakeholders. B Lab has provided model language to be added to an entity’s articles of incorporation. The language addresses possible legal concerns that the default fiduciary duties under state corporate governance law are inadequate to protect directors’ decisions that may balance stakeholder concerns or long-term interests to the detriment of shareholder interests. Specifically, the “language to amend articles” of a corporation states, in part, that a director:

shall give due consideration to the following factors, including, but not limited to, the long-term prospects and interests of the Company and its shareholders, and the social, economic, legal, or other effects of any action on the current and retired employees, the suppliers and customers of the Company or its subsidiaries, and the communities and society in which the Company or its subsidiaries operate, (collectively, with the shareholders, the "Stakeholders"), together with the short-term, as well as long-term, interests of its shareholders and the effect of the Company's operations (and its subsidiaries' operations) on the environment and the economy of the state, the region and the nation.

Interestingly, the language includes the consideration of any decisions impact on employees—even retired employees—as key stakeholders. Also of note is that the language states that it is not “intended to create or shall create or grant any right in or for any person other than a shareholder or any cause of action by or for any person other than a shareholder,” thus eliminating any doubts that other stakeholders may have standing to enforce compliance with the benefit corporation stated social mission or stakeholder engagement.

B. The Benefit Corporation in the CSR Context

20 Id.
21 Id. (emphasis added).
22 Id.
The perennial debate over the proper purpose of the corporation, and if there is a social responsibility for corporations, can be simplified—albeit oversimplified—to two opposing models: a shareholder theory of the corporation versus a stakeholder theory of the corporation. On one side the stakeholder model takes a broad view of responsibility that goes beyond maximizing shareholder interests to consider other stakeholders, such as customers, supplier communities, elements of society, and particularly internal stakeholders such as employees.23 In contrast, the classic shareholder-centric explanation of the corporation sees the entity as a vehicle for maximizing the interests of owners, with other groups having subservient interests.24

Historically, the origins of a manager’s primary duty to serve shareholders and their interests before considering other stakeholders or societal concerns25 is traced to the early twentieth century academic writing of Adolf Berle and Gardner Means.26 Further, the agency concerns discussed by Michael Jensen and William Meckling are also credited with helping to solidify the shareholder primacy focus of business managers.27 A more generally well known response to arguments that stakeholders should be considered in corporate decision making is Milton Friedman’s 1970 magazine article The Corporate Social Responsibility of Business is to Make Profits.28

In contrast, proponents of the stakeholder model of manager decision making for the corporation argue that the interests of non-owner stakeholders must also be considered along with shareholders interests.29 Initial conceptions of the stakeholder model of the corporation include primary stakeholders such as employees, customers and suppliers.30 Over time scholars have argued that other stakeholders interests warrant managerial consideration, including more abstract concerns such as the government and the environment.31

Legal scholars have also often entered this broad discussion about the proper role of the corporation in society. Most notably, Professor Lynn Stout has argued that long held assumptions from non-lawyer academics and some businesspeople of shareholder primacy are false and otherwise misguided.32 Moreover, Stout has argued at length that the misunderstanding of corporate law on the issue of shareholder primacy and maximizing

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23 Yves Fassin, The Stakeholder Model Refined, 84 J. BUS. ETHICS 1 (2009) (discussing the evolution of stakeholder categorizations over the previous 25 years).
24 Milton Friedman, The Corporate Social Responsibility of Business is to Increase its Profits, NEW YORK TIMES MAG. (1970).
28 Friedman, supra note 24.
30 Id.
31 See e.g., Fassin, supra note 23 (discussing Freeman’s original stakeholder model and subsequent additions to stakeholder theory leading to an “adapted stakeholder model”).
shareholder value is harmful to the interests of shareholders and other stakeholders, as well as to society.33 Other commentators have also concluded that fears of a shareholder maximization constraint on a director’s discretion are both widely held and mistaken.34 There is other evidence from legal resources such as the American Law Institute that the directors of traditional corporations retain the discretion to consider a range of issues when executing their business judgment, including social and stakeholder issues.35

The management literature on stakeholder theory may also provide some insight into the aspirational role of these new corporate models. Specifically, the salience of stakeholders—including traditional primary stakeholders like employees—is higher and more influential than the influence of expanded stakeholders included in a broader view of the firm, such as governments and communities.36 This debate over the purpose of the corporation and managers responsibilities under the law continues in various forums, perhaps most pointedly in the context of corporate social responsibility discussions.37

Yet despite these convincing arguments from legal academics that managers already have the discretion to make long-term decisions that take into account the interest of non-shareholder stakeholders, concerns over the reality and perception of constraints on managerial discretion have not subsided. Specifically, many in the social entrepreneurship community continue to have concerns over managers and directors discretion when operating in a traditional corporate structure because of arguably mixed judicial interpretations of the scope of their fiduciary duties.38 As a result the efforts to find a suitable corporate hybrid entity as a vehicle for social entrepreneurship continue, with one result being the now widespread adoption of the benefit corporation.39 Simultaneously the nature of work and how employees related to employers in the United States is also in a period of transition. These trends in employment are the subject of the next section.

II. The Evolving Nature of Employment and the U.S. Workplace

Over the last few decades during the same time the corporate social responsibility of business and the proper role of managers have been the subject of a heated debate; there have

33 See Lynn Stout, The Shareholder Value Myth, supra note 25 (generally challenging shareholder interests maximization as a requirement of United States corporate governance law). See also Einer Elhauge, Sacrificing Corporate Profits in the Public Interest, 80 N.Y.U. L. REV. 733, 736–37 (2005) (discussing, and challenging, the assumption that a corporation’s managers must solely maximize shareholder profits).
34 See, e.g., Underberg, supra note 4. Perhaps the shareholders interest maximization debate will have renewed life based on a recent rebuttal Stout and others from Judge Chief Justice, Supreme Court of Delaware, Leo E. Strine, Jr., in a forthcoming law review article called the The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law, WAKE FOREST L. REV. (forthcoming, 2015).
35 See American Law Institute, Principles of Corporate Governance, § 2.01 “The Objective and Conduct of the Corporation.” The guidelines state initially that a “corporate objective is to enhance corporate profit and shareholder gain.” However, even if profit or other gain is not promoted corporations are required to follow the law and “May take into account ethical considerations that • are reasonably regarded as appropriate to the responsible conduct of business” and “May devote a reasonable amount of resources to public welfare, humanitarian, educational and philanthropic purposes.”
38 Clark, supra note 2, at 7-14.
39 Id.
also been changes to the work environment of U.S. employees. This section briefly discusses some of the major trends that underlie the changing workplace and provides context for some of the possible impacts of benefit corporations on their employees.

Over the course of the late 20th century major shifts in the employment relationship occurred in the U.S. labor market. In one pronounced shift the representation of American workers by organized labor and collective bargaining agreements precipitously declined.\(^{40}\) As a result the protections for some workers that came with unions are potentially lost. However, at the same time another shift has occurred: a steep rise in the number of contingent workers, also known as temporary workers.\(^ {41}\) The number of these workers has grown and essentially doubled as a percent of the workforce.\(^ {42}\) Under the older model of unions “everybody seemed to benefit” because “workers got security, benefits and steady wage rises; companies got a stable workforce in which they could invest with a fair expectation of returns.”\(^ {43}\)

One interesting result of the use of technology for employee continent workers is the recent increase in “on demand” online labor-based business such as car services like Uber and Lyft or targeted personal services through TaskRabbit or Handy highlights this trend toward untethered freelance work.\(^ {44}\) The connotation of “freelancer” itself suggests a level of autonomy and could, themselves, represent the next stage in a long line of changes to the nature of work as great as the demise of the guild system, the advent of the industrial revolution, and the rise and fall of organized labor movements.\(^ {45}\)

Employment and labor law researchers have also noted the impact of these macroeconomic shifts in the labor market on workers relationship to employers, particularly in the new “knowledge economy” where use of intellectual property and information management is more prominent than traditional manufacturing.\(^ {46}\) Moreover, the widespread use of technology to improve efficiency in the workplace has also had important effects on the application U.S. employment law.\(^ {47}\)


\(^{41}\) See, e.g., Alison Davis-Blake & Joseph P. Broschak, Outsourcing and the Changing Nature of Work, 35 ANN. REV. SOC. 321, 322 (2009) (describing how the increased use of contingent workers, including outsourcing, has changed the nature of work and the workplace).

\(^{42}\) ECONOMIST, supra note 40.

\(^{43}\) Id. (however, “the model started to get into trouble in the 1970s, thanks first to deteriorating industrial relations and then to globalisation and computerisation”).

\(^{44}\) ECONOMIST, supra note 40 (as the subtitle of the article “there’s an app for that” suggests: “Freelance workers available at a moment’s notice will reshape the nature of companies and the structure of careers”).

\(^{45}\) As one discussion of the on-demand work model put it, “The idea that having a good job means being an employee of a particular company is a legacy of a period that stretched from about 1880 to 1980. The huge companies created by the Industrial Revolution brought armies of workers together, often under a single roof. In its early stages this was a step down for many independent artisans who could no longer compete with machine-made goods; it was a step up for day-labourers who had survived by selling their labour to gang masters.” ECONOMIST, supra note 42.


In this evolving world of workplace changes Professor Katherine Stone has discussed the “New Psychological Contract” at work in the human capital law and policy. The modern discussion of psychological contract theory (“PCT”) chiefly comes from the work of organizations scholar Denise Rousseau. Essentially, PCT posits that employer-employee relationship is marked by the parties’ understanding of the nature of the relationship and expectations for current and future interactions, which are shaped by forces like culture and law. Unlike law, the contract terms for things as varied as expectations of tenure, training, or even flexible work hours are not necessarily legally enforceable rights.

Under an older psychological contract workers provided long-term loyalty to employers and, in exchange, there was an implicit promise of long-term employment. However, with the shifts in the labor market the new psychological contract in the workplace is marked by the use of short-term employment relationships where the reciprocal loyalty between employers and employees is fleeting and it is understood that workers will have many jobs throughout their careers. In this model there is less incentive or time for employers to invest in their employees. In addition, this changed workplace with a higher percentage of contingent workers may itself lead to less job satisfaction for employees.

While this shift toward less job security and investment in employees may work well for some types of highly-sought after highly-skilled workers, others in the labor force have found themselves with less power in the employment relationship when it comes to things like bargaining over restrictive covenants. Moreover, the very scale and structure of for-profit employers in the U.S. is changing with trends leading to a high concentration of power in a declining number of large companies and the shift away from pensions to employer-sponsored retirement savings plans.

Another important trend in the last few decades among some workers is the emphasis on seeking meaningful work—often of a socially conscious nature—with organizations that best provide that opportunity to be personally fulfilled at work. There is also evidence that employers have adapted to gain an advantage in employee recruiting by highlighting the socially conscious nature of their businesses or other activities. This desire for meaningful work can be addressed by autonomy and self-directedness at work, including the participatory act of job

51 See Davis-Blake & Broschak, supra note 41.
52 See generally Norman D. Bishara & Michelle Westermann-Behaylo, The Law and Ethics of Employee Mobility, 49 AM. BUS. L.J. 1 (2012) (applying concepts of autonomy and employee choice to the contracting relationship between employers and employees).
53 See, e.g., GERALD F. DAVIS, MANAGED BY THE MARKETS: HOW FINANCE RESHAPED AMERICA (2009), 191 (discussing the shift of employees as pension-holders to investors as traditional benefit plans have evolved to 401(k) plans and as participants in the financial markets).
54 Blount & Offei-Danso, supra note 5 at 624 (“The 1990s witnessed a rise in socially conscious businesses motivated by the desire to be different and to appeal to a different constituent—employees and potential employees.”).
55 Id. (discussing a perceived trend that, “Entrepreneurs sought to hire the best talent and discovered the most efficient strategy for achieving a competitive advantage was through differentiation. Due to competition, image became a large element of employee recruiting.”).
crafting by employees. There are, nonetheless, limits on the type of jobs and amenable workplaces that allow for job crafting.

In addition, the extent to which “mission matters” to all types of workers may be hard to determine. For instance, it may be the case that younger and highly educated workers tend to care about their employer’s social focus and workplace quality more than other groups. It may be the case that certain types of workers have the luxury of seeking employment with mission-driven organizations and the wherewithal to find work in the most accommodating workplaces. The next section examines the potential for benefit corporations to provide an ideal business structure for fostering employee welfare, including along this job satisfaction dimension.

III. The Benefit Corporation and the Employee Interests Dimension

Following the above discussion on some of the trends in the U.S. workplace and CSR, a further inquiry into the usefulness and promise of the benefit corporation structure is now possible. Specifically, this Part examines the likelihood that benefit corporations provide an advantageous business structure for maximizing employee-stakeholder welfare. To begin, this part will first discuss a specific example of certified B Corp entering a major transition phase—namely Etsy—and then discuss the employee-focused aspects of the benefit corporate structure generally. Ultimately, the section evaluates benefit corporations on various employee welfare dimensions to determine if these entities are able to maximize employee interests in a manner that is superior to other existing legal formation options.

One interesting emerging example—and perhaps an emerging cautionary tale for social entrepreneurs—of a growing socially-driven company that is heralded as a champion of stakeholder engagement and progressive business practices is the online marketplace Etsy. The company is a certified B Corp, but not a benefit corporation. Since becoming a certified B Corp in 2012 Etsy has raised its B Corp score by 25 points. The company is also known as an exceptional place to work. For example, Etsy reported an 80% employee satisfaction rate in 2013, which was 20% higher than the United States company average.

Etsy is particularly notable for its recent steps toward becoming a publically-traded company in the near future, which will make it the largest listed certified B-Corp. Etsy’s history of extraordinary treatment of employees includes providing a majority of the cost of

56 See Justin M. Berg, Jane E. Dutton & Amy Wrzesniewski, Job Crafting and Meaningful Work in PURPOSE AND MEANING IN THE WORKPLACE (Bryan J. Dik, Zinta S. Byrne & Michael F. Steger, eds.) (2013), 81-86 (defining meaningful work concepts and providing a review of the organizational behavior literature on the topic).
57 Id. at 99 (discussing the boundary limits of job crafting).
58 For some indication of this possible cream skimming of educated workers, see Blount & Ofei-Danso, supra note 5 at 624 (arguing that with the rise of employee’s preference for socially conscious employers, the “[e]mployees gravitated towards companies they believed were kind to society and the environment, and took with them their intellectual resources.”).
62 In April, 2015 Etsy filed its Form S-1 with the Securities and Exchange Commission to begin the public offering process. Barinka, supra note 59.
healthcare, wages in excess of a living wage, and perks like pay for time volunteering outside of work time. Of note is that Etsy is not a benefit corporation, but may choose to convert to that format in the future to maintain its status as a certified B Corp incorporated in Delaware—although that change may be difficult because of the required shareholder vote. Etsy’s choice to not become a benefit corporation prior to going public may be related to concerns about negative reaction from potential investors.

Once it becomes a public company Etsy will no doubt be closely watched for signs that it is straying from its social aims and emphasis on stakeholders. In particular, as the company grows and faces the pressures of stockholders to act with shorter term interests in mind it will be interesting to see if the benefits to employees remain or get lost to cost cutting in the name of profit generation. Moreover, it will serve as an important test case to see if socially-minded company can scale up and still live its stakeholder-focused values. Will employees remain highly satisfied with their jobs and how will the pressures of the market impact employee welfare at the company?

To put it more generally, do benefit corporations uniquely create positive spillovers for employee stakeholders better than other legal forms? To address this question this section next examines the likelihood that benefit corporations have a positive impact on employee welfare and interests, including workplace quality and wages, job satisfaction, including branding to attract employees, and the participatory role of employees in corporate governance, including the promotion of employee voice. This section also focuses on the issues of employee benefit enforcement proceedings as a possible mechanism for protecting employee interests, in addition to other attributes of the benefit corporation model such as the third-party certification process.

Workplace Quality and Wages

From B Lab’s perspective it is clear that employees see advantages with these sorts of social enterprises. For instance, the B Lab website claims that “B Corps create higher quality jobs and improve the quality of life in our communities” and “as a result of our collective success, individuals and communities will enjoy greater economic opportunity, society will address its most challenging environmental problems, and more people will find fulfillment by bringing their whole selves to work.” Competitive wages matter for attracting and retaining talented workforces and B Lab recognizes that with a certification metric related to the percentage of a company’s workers receiving a living wage. Although, it must me noted that

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63 Id. (“At Etsy, this includes giving all employees 40 hours of paid volunteer time every year, paying employees more than 40 percent above the local living wage, and covering 80 percent of workers’ health insurance premiums, according to the company’s 2013 Values & Impact Annual Report.”).
65 One leading commentator, for instance speculates “that the company’s investment bankers, led by Goldman Sachs, and its lawyers, may have advised Etsy against becoming a benefit corporation before the IPO” because ‘Nobody wants to be first, they don’t want to make mistakes, there is no precedent, they don’t want financial exposure’ and “a company committed to the social good in addition to profits is often viewed unfavorably by stock investors.” Id.
66 As journalist put it, “Will life as a public company change Etsy? We’ll know by 2017.” Id.
what employees value in a workplace is a complex question and salary is not always at the top of the list of what matters in a particular position.68

Another feature of benefit corporations broadly related to compensation is that for employees from certain background there are loan forgiveness programs from a handful of business schools. At least three high-profile business schools—New York University’s Stern School of Business, Yale School of Management, and Columbia Business School—have extended their loan forgiveness programs to cover graduates employed at benefit corporations or other social enterprises, like certified B Corps.69

Interestingly, working at a B Corp, or for that matter any mission-driven organization, and being satisfied with the work might actually suppress wages for employees. If employees value intangible benefits from their work and derive value from working for a socially minded organization they may be willing to accept lower wages.70 Over time it is also possible that salaries at mission-focused entities will not grow as fast as in for-profit companies. Moreover, it is possible that benefit corporation employees will choose to stay in their current position longer because of the company’s attractive values and intangible benefits, and thus forgo the possible wage increases from job mobility.71

Job Satisfaction and Branding for Employees

A commonly accepted value of the benefit corporation is that the form provides a differentiator in branding between the social mission usually associated with nonprofit organizations and the efficiency of for profits.72 One of the reasons for adopting the benefit corporation is branding. This is because the choice of the legal form and the discipline of third-party certification broadcasts a signal to markets and stakeholders that the entity will

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68 Interestingly, for employees several factors, including a company’s values, matter more than salary. A recent large scale survey of workers found that, for U.S. workers, the top 10 workplace factors that matter most are: 1. Company’s financial stability; 2. Good relationships with superiors, 3. Good work-life balance, 4. Company values, 5. Appreciation for your work, 6. Good relationships with colleagues, 7. Job security, 8. Interesting job content, 9. Employer reputation, 10. Attractive fixed salary. BOSTON CONSULTING GROUP & THE NETWORK, Decoding Global Talent Survey, (2014), available at https://www.bcgperspectives.com/content/articles/human_resources_leadership_talent_us_workers_little_less_swagger/

69 See, e.g., J. Haskell Murray, Choose Your Own Master, supra note 10 (2012) (discussing the labor cost aspects of social enterprises, including loan forgiveness options and suggesting that the programs “could have a significant impact on attracting talent to social enterprises”).

70 See J. Haskell Murray, Choose Your Own Master: Social Enterprise, Certifications and Benefit Corporation Statutes, 2 AM. U. BUS. L. REV. 1, 52 (2012), (“even without loan repayment, prospective employees may be willing to accept a somewhat lower salary if they believe the company is socially and environmentally responsible.”).

71 Whether benefit corporations actually provide higher wages relative to other entities is an empirical question that, to my knowledge, has not yet been addressed. The best comparison may be to nonprofits since they are, like benefit corporations, mission driven.

72 Reiser, supra note 1, at 622. Professor Reiser explains, that “[n]onprofits, in essence, sell their halo. When they offer products to consumers, affiliations to partners, and jobs to employees, they are selling a sense of righteousness or trustworthiness, or both.” In contrast, she adds, “For-profits sell efficiency. They offer products of the highest quality and lowest price, affiliations to draw in revenue, jobs that pay a market wage, and training in efficient business operations.” But what about social entrepreneurs who have one foot in both sectors? Those entities, Reiser explains, “see themselves as offering something quite different. The profit motive makes them lean, efficient, innovative. But, their social mission keeps them virtuous and responsible. Thus, neither traditional nonprofit nor for-profit forms send the right message.” Id.
intentionally blend business and social goals.\textsuperscript{73} For example, one of the reasons B Lab cites for “Why Come a B Corp?” is for employers to “Attract and Engage Talent.”\textsuperscript{74}

One reason branding could be important as an indication of greater employee welfare is that the third-party certification to benefit reports could lead to a virtuous cycle where the benefit corporation’s managers value and reward employees in order to maintain the certification and improve the worker welfare ratings in, for instance, the company’s B Lab-monitored B Impact Report. The reported findings on employee satisfaction at companies like Etsy seem to bolster that claim.\textsuperscript{75} However, branding a company as socially conscious or “good” to work for, is not a new technique that the benefit corporation model claims alone.\textsuperscript{76} Moreover, other more established reporting and accountability standards, including ones with a worker welfare component like the Global Reporting initiative, already exist.\textsuperscript{77} Ultimately benefit corporation reporting will be most useful if it is shown to provide a superior level of disclosure and accountability through things like B Labs random on site audit of the B Corps it certifies.

While benefit corporations might attain a level of authenticity\textsuperscript{78} by taking on extra fiduciary and reporting duties toward their social mission, it is unclear if that alone will ensure a better environment for employees over the long term. The risk is that branding to attract employees who value mission-driven employers will devolve into merely marketing and a sort of “virtue washing” at the expense of genuine dedication to improving society. Nonetheless, while it is difficult to draw conclusions about employee welfare from the reporting requirement, there remains an “imbeddedness” factor. In other words, benefit corporations take on a voluntary mandate to consider “the employees and workforce of the benefit corporation, its subsidiaries and suppliers”\textsuperscript{79} and that orientation may indeed set a positive tone for the entire organization.

**Enforcement Mechanisms for Employee Welfare**

The transparency and the likely accountability impulse for companies that follows from the required reporting on employee issues for benefit corporations is an important part of publicizing and cataloging employee welfare. Yet, if actually promoting employee interests and participation is not required, per se, by the benefit corporation structure, are there more concrete mechanisms for enforcing employee welfare in these entities beyond the boundaries set up employment law that applies to workers in any business?

The accountability mechanism unique to benefit corporations is the often discussed benefit enforcement proceeding. The proceeding is described in § 305 “Right of Action” of the Model Benefit Corporation Legislation.\textsuperscript{80} Standing to use the proceeding mechanism is limited

\begin{footnotesize}
\begin{enumerate}
\item Id. “citing “four reasons why social entrepreneurs view hybrid organizational forms attractive: articulating and enforcing a dual mission, expanding funding streams, branding their enterprises, and achieving sustainability”).
\item B Lab, Attract and Engage Talent, http://www.bcorporation.net/become-a-b-corp/why-become-a-b-corp/attract-and-engage-talent
\item See Etsy, Values & Impact Annual Report, supra note 61.
\item Blount & Ofei-Danso, supra note 5 at 624.
\item See, e.g., B Lab, Differentiate from Pretenders, http://www.bcorporation.net/become-a-b-corp/differentiate-pretenders
\item See Clark, et al. (supra note 2, at 11 (from § 301 of the Benefit Corporation Model Legislation).
\item See Clark, et al, supra note 2, at 19.
\end{enumerate}
\end{footnotesize}
to the entity itself, a director of the entity, owners of 2% of outstanding shares, or 5% owners of
the benefit corporation’s parent entity.81 In theory other persons with standing to use the
proceeding can be authorized to do so in the benefit corporation’s articles of incorporation or
bylaws.82 Although the inclusion of employees as “other persons with standing” could be added
to the corporate documents that seems unlikely, in part because of the fear of nuisance suits
related to a broader definition of parties with standing to use the enforcement proceeding.83

As scholars have pointed out the benefit enforcement proceeding is an imperfect mode of
ensuring stakeholder protection. This is the case, “because only shareholders (and a few internal
stakeholders) possess the right to sue, employees and various external stakeholders might not be
protected, especially given the statutory bar from liability, except in the most extreme
circumstances.”84 The enforcement proceeding can represent a form of legal risk for benefit
companies, however thus far there are few if any examples of reported litigation using this
derivative action option.85

By design employees and other non-owner stakeholders are excluded from the right to
sue a benefit corporation using the new benefit enforcement proceeding. Accordingly, it seems
unlikely that employees or others effectively using the mechanism to force compliance with the
consideration or substantive elements of employee interests. Theoretically, a right of redress for
employees could be added to the corporate documents or employees could qualify for standing if
they are also a director or at least a 2% owner. Both cases are possible, however it seems
increasingly unlikely that as benefit corporations grow and mature any single employee will
continue to qualify as a significant enough of an owner to achieve standing under those terms.

Another option to enforce compliance with a duty to consider employees or other
stakeholders would be if the duty was spelled out contractually in employment agreements.
Along those lines, a collective bargaining agreement could function as a mechanism to protect
employees. Although unionization could put workers in opposition to employers from a
bargaining perspective, ideally in a stakeholder-friendly model employer-employee cooperation
should be the norm. However, either option seems unworkable and unlikely given the current
nature and size of benefit corporations and, in any event, a contract enforcement option to is not
unique to the benefit corporation structure and requires significant ex ante bargaining that would
need to include discussion of broader than usual stakeholder goals.

Employee Participation and Voice

Another important element of employee welfare is the extent to which an organization
allows for employee participation. The level of transparency and accountability provided by the
third-party certification and reporting is a particularly promising aspect of benefit corporations
when it comes to promoting employee welfare. Employee voice is important both as a

81 Id. at 19 (from § 305 (b) (1)-(2) of the Model Legislation).
82 Id. at 19 (from § 305 (b) (iv) of the Model Legislation).
83 The potential problem of nuisance suits if the standing to sue is too expansive is raised as a justification to § 305
in the Comment that immediately follows the draft language for that section). Id. at 20.
84 See J. Haskell Murray, Social Enterprise Innovation: Delaware’s Public Benefit Corporation Law, 4 HARV. BUS.
85 See Jesse Finfrock & Eric L. Talley, Social Entrepreneurship and Uncorporations, 2014 U. ILL. L. REV. 1867,
1881-82 (2014) (also finding only one case using a benefit enforcement proceeding). See also Ian Kanig,
Sustainable Capitalism Through the Benefit Corporation: Enforcing the Procedural Duty of Consideration to
Protect Non-Shareholder Interests, 64 HASTINGS L.J. 863 (2013).
management tool for business decision making, but also has impact on employee happiness and engagement in the workplace. In contrast, poorly designed organizational structures and management issues can lead to the negative situation of employee silence in the workplace.

While benefit corporations are not focused on employee voice promotion, the reporting structure and stakeholder consciousness of the model makes it more likely that employee participation and employee voice is fostered. This is, in part, due to the greater likelihood that benefit corporations will take employee opinions and input in to account more because of the third party reporting requirements. For instance, the B Corp certification requires quantifying worker welfare on dimensions like worker communication mechanisms, the percentage of employees with a living wage, and employee ownership. Moreover, by definition benefit corporations are designed to take into account employee-stakeholder interests and to balance those interests with the traditional profit-making role of all businesses.

Alleviation of Negative Trends in the Employment Landscape

Part II above discussed some of the important trends in the U.S. employment environment in relation to the state of employee welfare and the sometimes precarious position of employees in the American workplace. Whether or not benefit corporations alleviate some of the negative trends affecting workers is an important question to add to this discussion. One way to frame the issues is to ask: Is there a “Social Enterprise Psychological Contract” in the workplace? If so, what are the parameters of that new implicit agreement between entities like benefit corporations and their employees?

This is a difficult question to answer, in part because benefit corporations—and even social enterprises—have a relatively short track record in the economy with which to assess their relationship with employees. Nonetheless, ideally benefit corporations will demonstrate that they can provide longer term and higher quality employment opportunities, as well as invest in their workforces. The incentive to invest in employees may be high, in part, because as the benefit corporation space becomes more crowded and competitive these entities will find themselves competing for talented employees—both from the private sector and elsewhere. Yet,

87 Elizabeth Wolfe Morrison & Frances J. Milliken, Organizational Silence: A Barrier to Change and Development in a Pluralistic World, 25 ACAD. MANAG. REV. 706, 712-714 (2000). In their article Professors Morrison and Milliken identify organizational structures, policies, and practices related to the promotion or suppression of employee voice. They explain, “that when the unspoken yet dominant ideology within an organization is that (1) employees are self-interested, (2) management knows best, and (3) disagreement is bad, then management will erect structures and policies that either do not facilitate or that discourage upward information flow.” Id. at 712-13. Then Morrison and Milliken argue that, “[t]his tendency will be reinforced by managers' desire to avoid any threatening information or feedback. Two common structural features of organizations dominated by these beliefs will be high centralization of decision making and lack of formal upward feedback mechanisms.” Id. at 713.
88 See Frances J. Milliken, Cindy M. Schipani, Norman D. Bishara & Andrea Prado, Linking Workplace Practices to Community Engagement: The Case for Encouraging Employee Voice (draft on file with the author) (forthcoming, 2015) at 24 (“Although [benefit corporation] statues do not necessarily have an explicit voice-empowerment goal, increased opportunities for employee voice are embedded in this new corporate governance structure.”).
89 See RYAN HONEYMAN, THE B CORP HANDBOOK: HOW TO USE BUSINESS AS A FORCE FOR GOOD (2014), 53-55 (listing the elements of the “Quick Assessment of Worker Impact” metric for the required categories of compensation, benefits, and wages reporting).
in the short term, benefit corporations that are still in a startup stage may feel forced to rely on a higher percentage of freelance and other types of contingent workers until the company is larger and strong enough to support a workforce for the long term. A positive view of the benefit corporation model does give some hope that workers will be able to build a long-lasting and mutually-enriching psychological contract with benefit corporations.

CONCLUSION

Assessing the employee welfare dimension of benefit corporations is a complex undertaking and this paper is an initial attempt to begin that research process. This paper has looked at these emerging issues in the context of the changing nature of the U.S. workplace, as well as from an employee voice, compensation, and enforcement of stakeholder salience perspectives. From those perspectives, it seems that the benefit corporation has the potential to be an innovative vehicle for employee voice and participation because of the mission-driven nature of the company and the depth of require reporting on employee issues. The benefit corporation model’s propensity to deliver superior employee compensation and other workplace benefits is difficult to measure and may not be known until further research is conducted as these entities mature and grow.

What are, if any, the most effect mechanisms for effectively enforcing a benefit companies promise to take into account stakeholder interests and particularly important employee interests remains uncertain. As Professor Reiser concludes, “the benefit corporation lacks robust mechanisms to enforce dual mission, which will ultimately undermine its ability to expand funding streams and create a strong brand for social enterprise as sustainable organizations.”90 Put another way, “[t]he reality that corporate decision-making is largely a function of corporate choice rather than corporate law is no less true for the new benefit corporation. The B Corp legal regime no more guarantees that those companies will make “socially responsible” decisions than existing law prevents directors from doing so.”91

The important role for social entrepreneurs to promote employee welfare as part of their mission is seemingly more tied to the fulfillment of the third-party standards requirement than it is an automatic spillover of the benefit corporation’s legal form. In other words, keeping up with the third-party standards and making them part of the company’s “DNA” is crucial for any benefit corporation or social enterprise in order to stay true to the implicit promise to execute a dual business and social mission. Social entrepreneurs who opt for benefit corporation formation or B Corp status have gone a long way already to commit to going beyond the “being nice and getting credit for it” superficial aspects of complying with corporate social responsibility norms. There remains, however, a risk of benefit corporations to overpromise but under deliver to stakeholders—including employees and shareholders—and then end up alienating crucial constituencies.

Ultimately, from the employee’s perspective it is the commitment of the benefit corporation’s managers and directors to represent stakeholder-promotion ideals is what matters, and not necessarily the legal form of the entity. In contrast, another potentially great risk to the legitimacy of the nascent benefit corporation model is that if these businesses do not live up to

90 Reiser, supra note 1, at 593.
91 Underberg, supra note 4.
their social enterprise ideals and the stated social mission then they will leave employees disillusioned and more likely to leave for other organizations.