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Transparency Policy  
Project, Harvard Kennedy  
School of Government

David Weil  
Boston University School  
of Management /  
Transparency Policy  
Project

## [ PROSPECTS FOR THIRD GENERATION TRANSPARENCY IN THE WORKPLACE: SOME INITIAL SPECULATIONS ]

**ABSTRACT:** This note discusses a sequence of consideration regarding the need, obstacles to, and potential roles of improved information disclosure in the workplace. It argues that bringing greater transparency to the workplace is difficult due to problems of collective action among workers as well as the limitations of employee speech in the workplace. Nonetheless, opportunities may exist where the above problems are recognized and systems of transparency are designed with these limitations in mind. The paper concludes with initial ideas on research to investigate these ideas as part of a larger workplace regulation agenda.

# **Prospects for Third Generation Transparency in the Workplace: Exploratory Thoughts**

## **Overview**

Bringing greater transparency to the workplace is difficult due to problems of collective action among workers as well as the limitations of employee speech in the workplace. Nonetheless, opportunities may exist where the above problems are recognized and systems of transparency are designed with these limitations in mind. The paper concludes with initial ideas on research to investigate these ideas as part of a larger workplace regulation agenda and speculation on the future of workplace transparency.

## **The problem of transparency in the workplace**

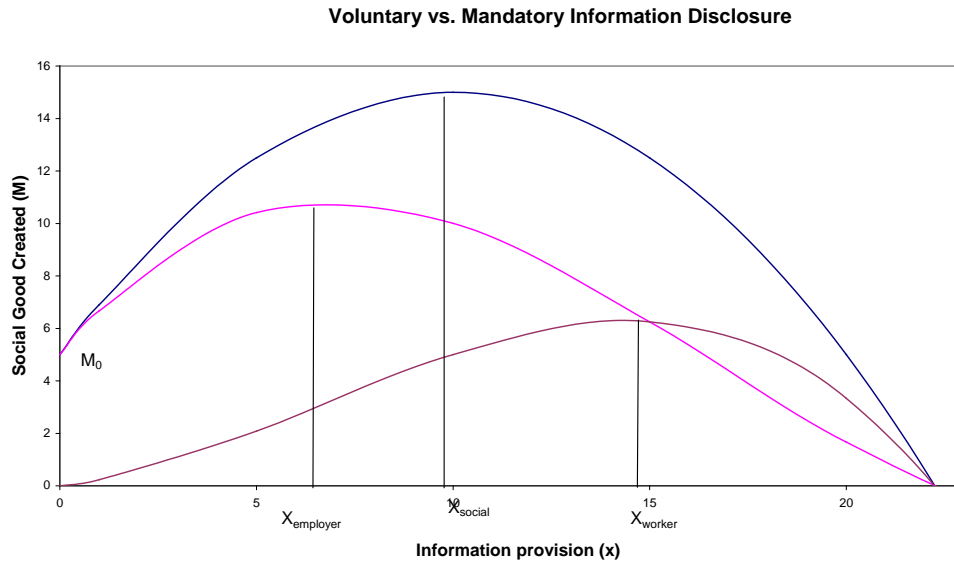
There is strong reason to believe that improved information disclosure could improve workplace outcomes: Left without some kind of mechanism to improve the flow of information between workers and employers, the amount of information provided by employers will be below what is socially desirable, even if the provision of additional information beyond what the voluntary release provides some (but not full) benefits to employers. Imagine that as workers are provided more information about their employment situation, the overall performance of a company (however measured) increases. This might arise from, for example, the fact that additional information improves the fit between employees and employers – that is correction of information asymmetries in the labor market – which in turn better matches individual worker skill and abilities with employer needs for skills and abilities, thereby also lowering the costs to employers from turnover, that arise from poor matching.

However, it might also be true that the provision of better information in the labor market improves the outcomes for workers by improving their individual or collective bargaining power. If it is the case that as more information is disclosed, the benefits arising from that additional information conveys increasing benefits to the worker relative to the employer, workers will desire greater disclosure than voluntarily provided by the employer.<sup>1</sup> This means that, on one hand, from a social point of view, the current amount of information provided by an employer would be less than socially

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<sup>1</sup> This framework is adapted from a model of employee participation by Freeman and Lazear (1995) that seems pertinent to transparency.

desired, but also that if workers were somehow able to wrest as much information as possible from the employer, that could exceed what is socially desirable (e.g. because that information might confer competitive benefits to other companies). This is depicted in the following figure:



The figure shows that as the amount of information provided by the employer increases, the overall amount of social output created increases (where, in the narrowest sense, social output equals the sum of profits and consumer surplus, but it can also be defined in terms of other non-tangibles including good will, community benefits, reputation, etc.). Here, the employer will provide some amount of information ( $x_{employer}$ ), but less than would be desired from a social point of view ( $x_{social}$ ).

## Why employers can continue to under-produce information

The above analysis pertains to many market situations where information provision is under-produced from a social point of view. However, in other areas—in particular in regard to consumer products, financial markets, and perhaps some areas of public services—a variety of third generation-related developments tend to push towards greater disclosure by the parties (apart from the independent effects of government-mandated transparency). For example, the web is providing an increasing amount of discloser-provided information on consumer experience with products that would tend to push voluntary disclosure to the “right” in the above diagram.

In fact, it seems to me an analytic way to think about the impact of 3<sup>rd</sup> generation transparency and its social consequences is to determine how its provision (1) moves disclosers to increase information provision or (2) replaces the need for the discloser to provide information with information provided by other parties (users).

The problem in the workplace context is that employers have greater property rights to information about the workplace than occurs in other areas. Cindy Estlund aptly sums this situation up:

What is perhaps most distinctive about employment relations, and what may explain the surprisingly limited traction of mandatory disclosure proposals in this context, is that employees – unlike consumers, shareholders, or members of the public who are affected by a firm’s products, services, processes, and decisions – are conventionally seen to be within the boundaries of the firm itself (once they are hired)...As insiders to the firm, employees may be thought to have access to information that makes mandatory disclosure seem unnecessary, and to be subject to organizational demands of loyalty and confidentiality that make public disclosure seem inappropriate. (Estlund 2009, p.3).

There are some dynamic effects from labor market competition that might, at times (e.g. very tight labor markets; occupational groups in high demand) push employers to provide more information about conditions in the workplace, but the combination of case law on free speech within the workplace; employer right to restrict access to the workplace from unions and other organizations; and employment at will doctrines create a far more restrictive environment in which to place third generation transparency. For example, it would generally be within an employers right to discharge an employee for embarrassing his supervisor or company by posting stories about their “bad behavior” in a blog (unless the incident and discharge was related to discrimination, exercise of a statutory right, or other area of protected activity).

## **Why workers and workplace intermediaries may under-produce disclosure**

A reasonable response to the above argument is that individuals or their intermediaries could play an important role in filling the gap between information as voluntarily provided and what might be socially desirable. Presumably, a variety of intermediaries could arise to do what hotels.com does in the service realm: provide user feedback about workplace conditions based on their direct experience. The experience so far, however, is that efforts to do so have been spotty and thinly populated.

The absence of workplace disclosure by workers may arise from a variety of sources: the nature of employment property rights as described above; the fact that many people work in small and medium sized enterprises where there are a limited number of disclosers to provide such information and users with potential interest in it; the absence of sufficient incentives relative to costs to provide information on an individual basis (a la my old benefit / cost of transparency approach to thinking about pressures to generate more and better information).

On the other hand, there might be particular occupational groups or labor markets where a richer set of intermediaries may arise over time. In particular, higher end labor markets (professions) or tight labor markets (high demand occupations or markets for experienced workers such as registered nurses; welders; and other occupations in short supply that require time to generate requisite skills (Uchitelle 2009). These particular cases are more likely give rise to communities where information about employers and workplaces are shared, resembling the narrow-but-deep social networks that form on the web around areas of particular expertise or common interest.

## **Employer fissuring and the need for enhanced workplace disclosure**

The growing use of various forms of subcontracting, self-employment, labor contracting, third party management and related methods of employment contracting have created fissures in the relationship between worker and employers (Carré *et al.* 2000; Ruckelshaus 2007; Zatz 2008). As a result, establishing the employer of record has become more and more complicated as businesses have contracted out, outsourced, subcontracted, and devolved many functions that once were done in house. This use of subcontracting, long used in construction and manufacturing, has become widespread in sectors ranging from building services to the hotel and motel industry.

Multiple motivations underlie the increase in non-traditional employment arrangements. In some cases, subcontracting arises from business strategies that seek to focus on core competencies while outsourcing activities not central to firm operation. With the falling cost of coordination afforded by information and communication technologies, productive reconfiguring of the boundaries of firms and industries arise. This is particularly common in industries that create intellectual capital like software development and entertainment rather than in goods producing or service providing industries and less characterized by vulnerable workers (e.g. Simchi-Levi et al 2003; Dyer and Hatch 2004).

In other cases, employment fissuring arises from a desire to shift labor costs and liabilities to smaller business entities or to third party, labor intermediaries such as temporary employment agencies or labor brokers. Finally, shifting employment to other parties arises from an employer effort to avoid mandatory social payments (such as unemployment and workers compensation insurance or payroll taxes) or to shed liability for workplace injuries by deliberately misclassifying workers as independent contractors (e.g. Carré and Wilson 2004; National Employment Law Project 2004) or to avoid the problem of vicarious liability under tort law generally (Arlen and MacLeod 2005; Rebitzer 1995).

The complexity of modern employment relationships require revisiting much of the way we regulate labor markets, particularly low wage markets where workers have become increasingly vulnerable (Weil 2010). One piece of that response is the need to think about how improved transparency – whether through 2<sup>nd</sup> or 3<sup>rd</sup> generation approaches – can help reveal these linkages. For example, in the hotel and motel industry, individual properties (and the people who work in them) may be owned by multiple parties (REITs, individual investors / partnerships, or investment groups, hedge funds, etc.). They are also likely part of a larger brand (who seldom own the property, but may have a small equity stake in some cases). In addition, a large number of owners contract out the day-to-day administration of the hotel to a 3<sup>rd</sup> party management company. In addition, the property may be monitored by a third party “equity manager” that serves as an agent for investors with large numbers of properties. Work at the hotel might be further contracted out to subcontractors in the areas of grounds keeping, maintenance, and sometimes even housekeeping.

Establishing who is responsible for payroll policies, exposures to potentially dangerous chemical products, or liable for injuries sustained is made extremely difficult by the web of relationships covering many workplaces. Monitoring past performance of the “employer” is also difficult. Transparency, in the form of revealing the multiple linkages that different parties have to a given workplace could become an essential feature of both undertaking traditional regulation of these enterprises and in creating 3<sup>rd</sup> generation pressures on disclosure.<sup>2</sup> Legislative proposals have been introduced in this Congress to increase the transparency of major corporations and their corporate connections to other business entities, but these seem to me to be limited to the usual suspects and tethered to 2<sup>nd</sup> generation perspectives on how one gathers this type of information.<sup>3</sup>

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<sup>2</sup> I would not underplay, however, the difficulty of doing this. Creating an up to date source on these relationships is extremely data and time intensive. One possible role of social networks is to decentralize data collection of this type of information through wikis or related approaches. I would be interested in seeing whether this could be done, perhaps by experimenting with setting up such a wiki in a specific industry or as part of a specific initiative.

<sup>3</sup> See the Corporate Responsibility for Occupational Safety and Health Act, introduced this session in the House.

## **Transparency vs. changing workplace default rules**

Sunstein (2001) outlines a variety of reasons why the current workplace regulation default rules are inconsistent with the preferences and behaviors in the labor market (particularly of employees). He notes that:

...workers are especially averse to losses, and not so much concerned with obtaining gains; workers often do not know about legal rules, including key rules denying them rights; workers may well suffer from excessive optimism; workers care a great deal about fairness, and are willing to punish employers who have treated them unfairly, even at workers' own expense; many workers greatly discount the future; and workers often care about relative economic position, not absolute economic position.

On the basis of these observations (and his analysis of the contract law of the workplace), he advocates changes to the default rules governing the workplace. For example, he calls for changing the default rule from “employment at will” to “termination for just cause.” Under this system, employers would still be able to ask employees to agree to employment at will as a basis for being hired, but this would require explicit discussion of those terms with the employee and presumably negotiation over terms of work given the loss of rights.<sup>4</sup>

As in other areas of regulatory policy, moving towards default rules implies (but does not require) that people are unable to make socially desirable decisions on their own, even if provided information. In an extreme version, it implies that the employer and employee causes of the information gap described above are insurmountable. A less extreme view would be that default rules set up their own informational requirements (or in fact provide a foundation for transparency policies to be effective). Thinking about the relationship between default rules and transparency represents an important area for us to pursue here as well as in consumer and civic domains.

## **Approaches for overcoming information obstacles in the workplace: Five ideas worthy of consideration**

Overcoming the information gap in the workplace through 3<sup>rd</sup> generation polices seem more formidable for reasons discussed above. However, the nature of those obstacles

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<sup>4</sup> A variety of studies have shown that workers believe they are far more protected from termination than they actually are, across income and education categories (e.g. Freeman and Rogers 2004).

also suggests several avenues and research areas where the opportunities for increasing workplace disclosure might be possible.

### **Organizing workplace information at a level other than the employer**

There are sites emerging providing information about labor market conditions at a geographic level: A number of sites provide users with a way to compare wages and salary at an occupational, regional, and national level ([www.paywizard.com](http://www.paywizard.com) ; [www.salary.com](http://www.salary.com)). State- and federal-employment services provide similar information. This benchmark information can be useful at a general job search level, although probably does not provide the kind of nuanced information that effective search may require, and obviously lacks specific content about an employer's compensation system. I have heard—but not seen any documentation—of worker centers and day labor organizations in California serving this role as well as enforcing local labor standards (at least prior to last fall when many of these labor markets were hard hit by the recession). These efforts could be investigated as a set of mini-cases under this general heading.

### **Changing the boundaries of employer rights to restricting information**

The boundary between free speech and property rights in the workplace is contested. There are currently pieces of legislation that seek to change these boundaries, such as levying greater penalties for employers restricting access to their workplaces from unions and engaging in “captive audience” speeches during organizing drives (related to the Employee Free Choice Act). Sunstein's default rules discussed above could potentially lead employers to have to disclose more and workers to demand more information in their initial interactions at the time of hiring. Changing boundaries would alter the level of voluntary disclosure depicted in the figure above. Defining current boundaries and their limits could be a discrete project for a law student to pursue.

### **Changing definitions of employer responsibility and liability to encourage greater transparency**

Changes in the doctrine of vicarious liability as applied to the workplace could also have impacts on the degree of voluntary disclosure in the workplace. For example, under current interpretations, employers who hire other businesses as independent contractors have an incentive to distance themselves from any activity that has the appearance of involving operational, day-to-day decisions because of the liability implications of those actions. If this changed, it could create greater incentives for

disclosure by contractors (suppliers, third parties, franchisees) to principals by agents in the workplace. This could alter some of the barriers discussed above.

### **Complementary workplace governance:**

The most fruitful forms of workplace disclosure in the near term may be where disclosure of existing information about employer behavior (via compliance with laws, EEOC, injury and workers compensation, other information on past compliance) can be made more accessible via the web, and—more importantly—linked across sources. This could have impacts on both the use of information by regulators themselves as well as providing individual and groups of workers and their intermediaries with information that can be acted upon through existing governance mechanisms. There are experiments being discussed at the Department of Labor that are in this area of using disclosure as a complement to OSHA and the Wage and Hour Division.

### **Disclosure and rights**

A related approach is using existing or aggregated information to enhance exercise of workers rights and private rights of action through increased awareness of those rights and how individual employer behavior maps to that of other employers. Unions, worker centers, workers advocates, and the plaintiff bar might all be agents that would draw on this information. Other social networks may also emerge that provide this information (and help bridge the information gap about rights as well as conditions within the workplace).

### **Future of workplace transparency**

People entering the workforce today have grown up in an environment of unprecedented access to information, opportunities for social networking, and a far higher level of comfort in sharing information about their own experiences. This will undoubtedly affect the amount of information circulating through social networks about the workplace and work life. Although this may be limited to some segments of the labor market (better educated / higher incomes), it may give rise to changing dynamics in the amount of information “floating” about employers and change the dynamics of voluntary disclosure along with creating opportunities for new intermediaries and information hubs.

These changes in the user base for workplace transparency could significantly alter some of the factors that have slowed its diffusion to date. For example, the public goods problem in some senses arises from individual perception of how willing they are to share information beyond immediate friends and colleagues. One conclusion from a

casual review of postings on Facebook is that people have a desire to share information goes beyond direct transactional concerns. A collective organization to expand the amount of public-good type workplace information may be able to take a very different form in a world of such user preferences.

Equally, changes in expectations about disclosure could place employers under greater pressure to provide more information regarding day-to-day worklife than has been the case in the past, both as a result of demands from current and prospective workers and from changing attitudes among those people making decisions about workplace communication. All of this could lead to rapid and significant shifts in the mechanisms of workplace transparency in the future.

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