

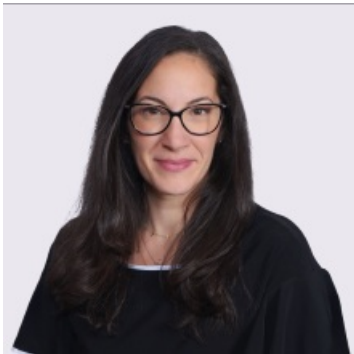
Podcast

ESG: U.S. Employers Reporting Obligations in the E.U.

By Laura A. Mitchell, Christopher V. Anderson &

December 3, 2024

Meet the Authors



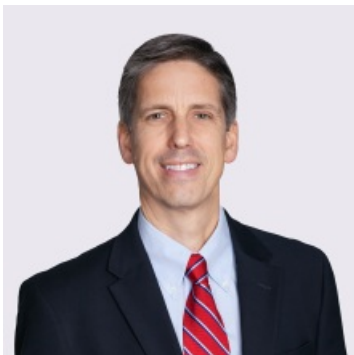
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Related Services

Environmental, Social and
Governance (ESG)

Details

December 3, 2024

The European Union's Corporate Sustainability Reporting Directive (CSRD) mandates comprehensive sustainability reporting with an eye toward increased transparency for both EU companies and qualifying non-EU companies with significant operations in the EU.



Transcript

INTRO

The European Union's Corporate Sustainability Reporting Directive (CSRD) mandates comprehensive sustainability reporting with an eye toward increased transparency for both EU companies and qualifying non-EU companies with significant operations in the EU.

On this episode of We get work™, we discuss the new reporting requirements as well as the additional due diligence exercise intended to identify risks on human rights and environmental issues, and also to mitigate those risks. We also consider how these obligations will be received in light of the recent shift in organizations' stance on ESG policies generally—which may make it challenging for U.S. employers to meet their obligations.

Our hosts today are Laura Mitchell and Chris Anderson, principals, respectively, in Jackson Lewis' Denver and Greenville offices. Laura co-leads the firm's ESG group, and Chris focuses his practice on cross-border employment work. They are joined by Pieter Pecinovsky, L+E Global EU Group Co-Leader and Of Counsel and Knowledge Manager, Van Olmen & Wynant, a Belgium based law firm.

Laura, Chris, and Pieter, the question on everyone's mind today is: What are the ESG obligations of U.S. employers under the CSRD, and how does that impact my business?

CONTENT

Laura A. Mitchell

Principal and ESG Co-Leader

This is Laura Mitchell. I am in the Denver office of Jackson Lewis and I co-lead our

ESG practice group, for those of you who haven't heard my voice before. I am thrilled today to be joined by Chris Anderson from our Greenville office. Chris is part of our ESG core team, and we are honored to be graced with the presence of Pieter Pecinovsky from L+E Global, our international partnership.

We're going to talk today about the intersection of ESG for U.S. employers and their obligations in the EU: What they should be thinking about, how they should be planning and preparing going forward into 2025 and beyond.

And we're going to do something a little different today. I'm actually going to kick it over to Chris. And Chris is going to lead Pieter and mF in our discussion. So, I actually get to answer questions today as opposed to asking them. Chris, take it away.

Christopher V. Anderson

Principal

Thanks, Laura. I'm Chris Anderson and I'm one of the principals with the International Employment Group here at Jackson Lewis. For the last 10+ years, I've been doing dedicated cross-border employment work and mobility work and love to get to do what I do. The shadow side of that — and I don't mean that in a negative way, but the reality is I work in over 100 countries, liaising with local council. So, by nature, I have to be somewhat of a generalist in that and hopefully go deeper. We cover a lot of countries in our work and I do love that about it, but I do need specialists. And that's why getting to be with the brain trust today with Laura and with Pieter is so important is one of the heads of our EU directives group within Labor and Employment Global, which is our global alliance that Jackson Lewis is one of the founding members of. And L+E Global is our global alliance in over 30 countries around the world For every listener, you're going to get a treat of hearing from Pieter Pecinovsky, who as Laura said, and growing. Pieter runs the EU Directives Groups, is one of the leaders of that.

Pieter, why don't you tell us a little bit about the EU Directives Group and specifically the ESG directives that are coming down the pipe right now.

Pieter Pecinovsky

L+E Global EU Group Co-Leader; Of Counsel and Knowledge Manager, Van Olmen & Wynant

Thank you, Chris. As you said, I'm co-leading the EU group within L+E Global. We have a lot of different EU member states within the group and so we come together, virtually mostly, often to discuss the new directives. How can we help our clients with these directives and the case law of the Court of Justice of the European Union — and really all knowledge sharing — but also EU-wide projects to help the clients.

Something that is really a trending topic within the EU are these ESG Directives. You have two main directives: the CSRD and the CS3D. The CSRD is the Company Sustainability Reporting Directive, and this is all about transparency. It's about reporting on ESG matters. It asks companies to make an annual report about ESG topics. The CS3D is the next step. It doesn't ask you to make a report, but it asks companies to make a due diligence exercise to identify risks on human rights and

environmental issues, and also to mitigate these risks to take action. So that's the next step.

Anderson

Pieter, let me jump in right there just really quick. What we're going to get to today in this discussion is really how does this affect U.S. employers and what should U.S. employers be doing now to prepare and to begin to be compliant? As we get to that, Laura, let's start with the U.S., though — really where U.S. employers are obviously living first and foremost. What is the current state right now of ESG regulations in the U.S.? What are you seeing? What are you hearing? What do you hear from clients?

Mitchell

in the environmental space, sustainability, but from this social impact issues in the U.S. And we saw companies and organizations really getting pressure from stakeholders, employees, customers to be really forward about their stance on issues like diversity and employee protections. That's a fantastic question, Chris, because the current state is unstable. For the past 12, 18 months, even before that, we've started to see shifting perspectives and priorities in the ESG space. Out of the George Floyd movement and the MeToo movement, we saw a *push* towards more transparency, more focus on ESG; not so much In the most recent months, we have seen a *turning of the tide*; really the pendulum swinging to the other direction where there are now competing interests that are forcing companies to *pull back* from their commitments to ESG standards, whether they be sustainability or the social impact issues or governance.

So, we see organizations trying to *navigate* these changing tides and figure out what to prioritize, what they're legally required and obligated to do, and overlay what they *want to do* as an organization. There's no real clear path here in the U.S., and it seems as though we were kind of following the EU footsteps initially and really kind of getting some ESG laws on the books — or at least trying to — and some regulation. And *now* we have taken a bit of a turn and we're seeing pull back from that where it sounds like Pieter's going to explain the EU is kind of still trudging forward with these new initiatives.

Anderson

We'll transition to you, Pieter, on this because we want to hear differences or divergences from what Laura was just talking about. But just for a minute, imagine a world where these were mutually exclusive and the EU is doing what the EU is doing and the U.S. is doing what it's doing. No issue, right? No crossover implications would be needed there. We wouldn't have to discuss these things to this level.

But that's not the case here. So, Pieter, for the U.S. companies out there, they're going to listen to this. How are they likely covered by these directives? You talked about the CSRD and CS Triple D. How are U.S. companies going to be implicated by these directives?

Pecinovsky

Thank you, Chris. That's a great question. The EU extended the scope of application of these two directives to a global scale, and so the directives can directly apply to U.S. companies if they have a significant EU turnover and if they have a physical presence within the EU: By example, for the CSRD, it's around €150 million per year that they have to have a turnover within the EU and they need to have a branch within the EU — then they will need to submit a report under the CSRD themselves. And so, it's a direct application.

They can also be indirectly impacted, by example, if they have an EU subsidiary that is big enough to fall under the scope. The subsidiary will probably need them to give information, so they will have to go to their U.S. parent companies to help them with these reports. Another way of indirect impact is that these directives also look at the value chain of companies. And so U.S. companies, their clients or their suppliers might come to U.S. companies with questions for their own reports. And, of course, it's difficult to refuse information to clients. So that's another way how U.S. companies might get involved.

Anderson

Yes, that's such a big point, Pieter. It's not only going to be that direct implication, but indirect. It's just key for U.S. companies to know about and be prepared for it, to be prepared that someone who is implicated that they're doing business with or affiliated with is going to be asking these questions to them. So, there's even that implication as well.

As we go forward, Pieter, call out a few of the requirements of the directives, in the time allotment that we have today, that would be the most impacting for U.S. companies to hear about.

Pecinovsky

Let me take as an example some of the social aspects of the CSRD, so the reporting directive. You need to report on 17 social aspects — a lot. We're not going to discuss all of them. But by example, one of the significant ones is the collective bargaining rate, the social dialogue systems within the companies. The directive asks you to report on how you are consulting employees. Are they covered by collective bargaining agreements? As we know, of course, collective bargaining is a bit more significant and stronger within many European countries than in the United States. So that could be an issue, although also within the European Union, there are different levels of collective bargaining, of course.

Another issue could be the fact that you need to report as a company on the social security and health care protection of your employees, and what you are doing to offer health care to your employees. This could be an issue. Also, by example, work-life balance is a third example. Does the company offer paternity leave to employees or parental leave in total? All these things are examples that could be quite impactful for you as companies, to give three examples.

Anderson

Right. And this is really for all of us, for Laura and Pieter, both of you together. Given Laura, what you're saying about the shifting sand — this swinging pendulum

here in the U.S., even some of the pushback towards ESG in recent months that we anticipate will continue at least to some degree — and then what Pieter's saying on the EU side: Where are those points, Laura, that you think or could foresee U.S. clients really needing to dive in, dig in a little more on this to understand?

Mitchell

is a huge question. And that is just *one* piece of this puzzle that we have seen start to change over time. Especially with the changes in administration, we've seen the pendulum kind of really swing both ways, and we're expecting it to come kind of back towards this notion that it's easier for employers to classify folks as independent contractors under the next administration where it had been more difficult. Yes, there's so many things to think about. At a fundamental level, one of the first places I start is the definition of an *employee*. Because here in the U.S., whether you're an independent contractor or can be classified as an independent contractor versus an employee who is entitled to more protections and rights and benefits in the previous or the current administration.

How companies think about their workforce is going to be a starting point because, Pieter, I'll leave it to you to explain, the EU takes a little bit of a different perspective on employees versus independent contractors and the hurdles and the rigor with which you have to go to really be this independent worker.

Pecinovsky

That's correct, Laura. It's interesting that you bring this up because also on this topic, if you use a lot of external workers or a lot of employees, you have to cover both of these categories of workers in the report. So, you also really have to report on how you are treating contractors, self-employed contractors, *et cetera*. So that's also an important issue that has risks, of course, because it could indicate bogus self-employment within the company.

Now, self-employment or the qualification as an employee is not regulated on EU-wide basis. It's only national law, except for platform work, there is a new directive. And so, there is a lot of diversity within the EU on this topic. It mostly depends on national law, but now we have this directive that forces at least the companies to report on that. So that that's a new issue.

Anderson

And that raises one big point for me, Pieter and Laura both: We won't know until these directives really begin to be transposed by the member nations across the EU. We'll see this flesh out and we won't fully know the effect until then. But U.S. companies need to be preparing now and thinking through it now, because my big question, Pieter and Laura both, is: How likely do we think it is that the responses to either one of the directives, so the diligence and the reporting, could lead to or trigger labor audits or tax audits? Pieter, have you dealt with that at all? Is that something that you even think could be a potential trigger here? We're talking about contractors versus employees. When you report on these things, could that trigger an audit somewhere in the EU in a member nation?

Pecinovsky

Well, the interesting thing about these reports is that they will have to be published online, accessible for anyone. So not only the social inspection services will have access to them, but also trade unions, which are often quite powerful within the EU. And so, I think definitely they will trigger social audits by social inspections. They will also probably use it against employers if they come with different information in a private investigation, by example. That will be a major risk. So, you really have to think about what we are reporting and can we uphold this later if we have to give more information towards the social audits. So yes, I think so.

Anderson

Practically speaking, I've actually seen this flesh out already, in a different context with government contracting, where there's diligence that contractors have to do to downstream providers. They find out the provider has tons of contractors around the world and it becomes a lightning rod issue of having to think through, "OK, what are we exposed to?" This is going to be even more potential for that as well.

One issue that I've had, practically speaking, is in the union context that you just mentioned, Pieter. There was a union complaint brought against a car manufacturer just recently based on the German law that's a predecessor to these directives. It's kind of walking in step with them and basically saying that the U.S. actions towards collective bargaining in the U.S. were violating the German statute.

how this will flesh out in terms of how these laws will be transposed and what effect they have on U.S. clients and companies is to be continued. But I want to believe— Pieter, maybe you can opine on this as we come to a close, that as long as U.S. companies can show that they're following in lockstep as closely as possible with U.S. law, they will be able to give the diligence on that, to report on that, And so, again, and that that will be sufficient through this. I know we won't know exactly how this will flesh out, but what's your take on that, Pieter?

Pecinovsky

Well, Chris, I think that the directives and the reporting standards included in the directives are really drafted on a European view, on a European basis. Indeed, these ideas about social rights are really from a European perspective, where, by example, the right to collective bargaining is extremely important. And so, it could be indeed used by European workers or trade unions against companies in the U.S. However, I tend to agree with you. If you can show as a company, we are actually following local rules and local laws and fundamental rights that are applicable within the U.S., then *probably* there will not be an issue.

But, of course, this is the U.S., a trusted partner of the EU. Look at other countries where the laws are maybe less democratic, where there are maybe forced labor camps. Then, of course, the argument that we are following local law will not apply. It's a tricky issue, let's say. It will really depend on the situation. But for U.S. companies, I do not assume that this will be a major issue to use this argument.

Anderson

In a baseline, at the very minimum, there'll be, however the legalities shake out, we know for sure there'll be pressure exerted on U.S. companies to come into

compliance with a European sensibility or to kind of come to that level. This union complaint that I reviewed, it was clearly trying to overlay that. So put that pressure on a U.S. company and really on the German parent to put pressure on the U.S. company to tow that line. And so, yes, it remains to be seen. Laura, what are your closing thoughts on that in terms of blending these together?

Mitchell

The overarching thought for me is one aspect that we haven't talked about from the U.S. perspective: This notion of company reputation and the fact that a lot of pressure in the U.S. on organizations has come not from legal enforcement, from regulators or from the court system, but through activist shareholders, through this cancel culture that we have from customers, from employee attrition, who are kind of speaking with their feet. We had this great migration of employees who left organizations because they didn't align with their values.

And so, part of this that companies have to think about is what are their values as an organization and how do they align with the compliance requirements in the EU and what they're being asked to do in the U.S. Can they take one singular position or are they comfortable having divergent or differing positions depending on the jurisdiction? And maybe that's a question that gets answered by another question: Who's exerting the pressure? Who's asking for the action from the organization? Which stakeholder are we needing to respond to?

So just some parting thoughts as we kind of round out our discussion today. Certainly, not the *last* time that we'll be talking about these things. I'm actually excited to talk to you guys again next year in 2025 to see what developments we have and where we go from here.

I really appreciate the dialogue. Pieter, thank you so much for your expertise and for joining us. We look forward to the next time we get to chat.

Pecinovsky

Thank you, Laura. The pleasure is all mine.

Mitchell

Yes. Thanks.

Anderson

Thanks, both.

OUTRO

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