

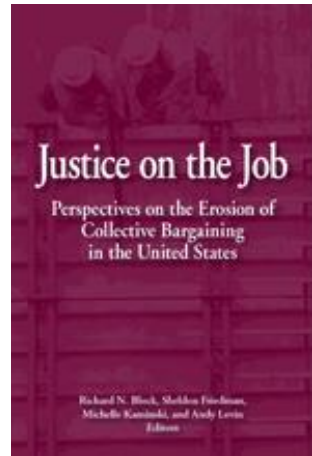
---

Upjohn Institute Press

---

## No More Business as Usual: Using Pension Activism to Protect Workers' Rights

Jayne Elizabeth Zanglein  
*Western Carolina University*



Chapter 14 (pp. 305-330) in:

**Justice on the Job: Perspectives on the Erosion of Collective Bargaining in the United States**

Richard N. Block, Sheldon Friedman, Michelle Kaminski, Andy Levin, eds.  
Kalamazoo, MI: W.E. Upjohn Institute for Employment Research, 2006  
DOI: 10.17848/9781429454827.ch14

# 14

## No More Business as Usual

### Using Pension Activism to Protect Workers' Rights

Jayne Elizabeth Zanglein  
*Western Carolina University*

Exporting jobs, reincorporating in off-shore tax havens, rewriting the bottom line, defrauding shareholders, polluting the environment, paying sky-rocketing executive compensation, and overinvesting 401(k) assets in employer stock—it is all business as usual for U.S. corporations. But the international outcry that erupted after the stock market reached a five-year low post-Enron has caused organized labor to rally under the slogan “No more business as usual.” Corporate campaigns aimed at law-evading corporations are becoming increasingly common. Shareholder proposals on corporate governance issues have proliferated, and activists have taken the drastic step of petitioning the State of California to revoke Unocal’s corporate charter. These actions, once seen as radical, are now being accepted by a public that has lost faith in the ability of corporations to restrain management greed.

This chapter will discuss the duties of pension fund trustees as universal owners, the role of trustees in ensuring corporate accountability, the potential of pension fund activism to encourage corporations to respect workers’ rights to organize and bargain collectively, and the tactics being used by pension fund activists to encourage good corporate citizenship.

#### UNIVERSAL OWNERS

Workers have over \$10 trillion invested in their pension funds: \$2.2 trillion in defined contribution plans, \$4.5 trillion in defined benefit

plans, \$2.3 trillion in individual retirement accounts, and \$1.2 trillion in annuities (Schneyer 2003). Of this amount, \$302 billion is jointly managed by workers and employers through Taft-Hartley funds (Jacobius 2003)—collectively bargained funds which, under the Taft-Hartley Act, must be managed by equal employer and employee representatives. The New York Stock Exchange (NYSE) has reported that stock ownership is concentrated among two groups: individuals and institutions. As of 1998, individuals directly own 41.1 percent of U.S. corporate stock (NYSE 2000, Table 16). Institutional investors hold the remaining 58.9 percent of corporate stock through mutual funds (16.3 percent), state and local government retirement plans (11.4 percent), defined contribution private pension funds (8.9 percent), defined benefit private pension plans (5.6 percent), banks (3.8 percent), life insurance companies (3.5 percent), other institutional investors (2.2 percent) and foreign investors (7.2 percent) (NYSE 2000, Table 16).

As the owners of nearly 26 percent of U.S. equity (PR Newswire Association 2000), pension funds are in a position to influence corporate and public policy. The largest pension funds, such as TIAA-CREF, California Public Employees Retirement System, and New York City Employees' Retirement System, hold such large concentrations of company stock that they cannot sell off stock of poorly performing or irresponsible corporations without suffering a loss caused by their divestment.

The solution to this catch-22—that pension fund investors are too large to sell off poorly performing stock without taking a loss caused by their own sale—is the exercise of universal ownership rights. Hawley and Williams (2000, p. xv) describe the universal owner as “a large institutional investor that holds in its portfolio a broad cross section of the economy, holds its shares for the long term, and on the whole does not trade except to maintain its index.” Most large pension funds are universal owners: as long-term investors, they invest in diversified index funds and patiently hold on to corporate stock while meeting with corporate executives to encourage corporate reform.

As permanent holders of a large segment of U.S. and foreign corporations, pension funds must look beyond the financial performance of individual stock holdings to the performance of the economy as a whole. When a corporation dumps the cost of doing business onto an unsuspecting third party (called “externalities” in economic terms), the

universal owner has a stake in that third party and will suffer a loss. For example, the profit made by a pension fund that owns shares of a corporation that produces tobacco will be offset by significant increases in health care costs and decreases in worker productivity. Likewise, a pension fund that invests in corporations that engage in financial manipulation will suffer financially when the entire stock market declines because of loss of investor confidence in the efficiency of the markets. The cost of the externality is simply shifted to another entity owned by the pension fund. Thus, it is in the financial interest of a universal owner to support public policy initiatives that reward corporations who pay for the damage caused by their actions (i.e., corporations who internalize costs). Hawley and Williams (2000) observe that “a universal owner that really wants to maximize the shareholder value of its portfolio . . . need[s] to develop a public policy-like position and monitor regulatory developments and legislation on a number of key issues [important] to the economy as a whole (p. 170).” Such issues include the health and well-being of corporate employees, the impact of corporate actions on the ecology and the environment, respect for diversity and human rights, and the economic impact on the community in which the company operates (Grayson and Hodges 2002). The emphasis will thus shift from maximizing short-term profits to maximizing long-term value.

## THE ROLE OF PENSION FUND FIDUCIARIES

Pension fund trustees must act solely in the interest of plan participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries. (29 U.S.C. § 1104 (a)(1)(A)).<sup>1</sup> Trustees must also act prudently, that is, “with the care, skill, prudence and diligence under the circumstances then prevailing” that a prudent trustee would use (29 U.S.C. § 1104 (a)(1)(B)). This prudence rule extends to the trustees’ duty to vote on management and shareholder proposals in their capacity as stockholders. The U.S. Department of Labor (USDOL) has stated that trustees have a fiduciary duty to vote on corporate proxy issues<sup>2</sup> and actively monitor corporate management. (USDOL 1994). According to a 1988 letter from the USDOL to Helmuth Fandl, chairman of the retirement board of Avon

Products, Inc., a trustee should vote on proxies that may affect the value of stock held by the plan.

Where proxy voting decisions may have an effect on the value of a plan's underlying investment, plan fiduciaries should make proxy voting decisions with a view to enhancing the value of the shares of stock, taking into account the period over which the plan expects to hold such shares.

However, the trustee may not subordinate the interest of plan participants to unrelated goals. A trustee may engage in shareholder activism if the trustee concludes that the activism is likely to "enhance the value of the plan's investment in the corporation, after taking into account the costs involved" (USDOL 1994). Shareholder activism is particularly appropriate where a stock portfolio such as an index fund is being held on a long-term basis or where the plan cannot easily dispose of the stock without affecting the stock's value (USDOL 1994).

The USDOL suggests ways that trustees can engage in shareholder activism: by corresponding and meeting with corporate directors, voting on proxies, sponsoring shareholder proposals, and filing shareholder litigation. The purpose of the activism, however, must be to enhance the value of corporate stock held by the pension fund. Where the costs of activism outweigh the potential increase in shareholder value, activism should not be undertaken. It may be more appropriate, therefore, for a large public fund to engage in shareholder activism rather than a small welfare fund.

## **EFFECTS OF CORPORATE CONDUCT ON STOCK PRICE**

Studies have shown that corporate conduct, both positive and negative, has an effect on stock price. Such conclusions seem obvious in light of the stock market's clear reaction to recent events such as Merck's deception about the safety of Vioxx, Safeway's antiunion campaign, the collapse of Enron, the announcement of widespread corporate accounting fraud, the shredding of documents by Anderson, the bankruptcy filing of WorldCom, the indictment of Adelphia's corporate officers, and the criminal indictment of Tyco's chief executive. Likewise, the recent \$9.8 million settlement against Dow Corning and the court's decision to

permit a nationwide, punitive damage class-action lawsuit against the tobacco industry impact stock prices as corporations are forced to pay for their externalities.

On the other hand, laudable conduct also affects share price over the long run.<sup>3</sup> For example, Enterprise Rent-A-Car's reputation was enhanced when, after September 11, it made an exception to its round-trip requirement and allowed stranded airline travelers to rent cars to return home. Alexis Hocevar, vice president and general manager of an Enterprise regional office, said, "We knew we had to do the right thing and worry about the rest later" (Reichheld 2002). As a result, Enterprise suffered losses from displaced and stolen cars. But it decided to live its philosophy to "put customers first, and employees second, and profit will take care of itself" (Reichheld 2002).

According to a 2001 Hill & Knowlton survey, called "Corporate Citizen Watch," "79 percent of Americans take corporate citizenship into account when deciding whether to buy a particular company's product, with 36 percent considering it an important factor" (Business Wire 2001). The results are surprising, given that most Americans don't appear to boycott products. The survey was conducted in Spring 2001 and consisted of 2,594 people participating in an on-line interview. The survey also found that 71 percent consider corporate citizenship in their investment decisions. However, less than 2 percent of those surveyed believe that U.S. companies are excellent corporate citizens, and about 25 percent believe corporations are "above average" citizens. Harlan Teller, executive vice president and director of Hill & Knowlton's Worldwide Corporate Practice says, "There is no question that Americans believe companies have a responsibility to their communities. But our survey findings suggest that corporations need to do more than simply give away dollars. They need to act in ways that are meaningful to their stakeholders—consumers, investors, employees, and members of the local community—and that genuinely demonstrate their core corporate values" (Business Wire 2001).

According to Hill & Knowlton's "Corporate Reputation Watch 2002" survey of more than 600 chief executive officers, 94 percent of CEOs believe corporate reputation is very important (Hill & Knowlton 2002, p. 6). The survey found that CEOs rank the top three influences on corporate reputation as customers, employees, and the reputation of the CEO (Hill & Knowlton 2002, p. 8). CEOs of corporations with

revenues greater than \$500 million are also strongly influenced by industry analysts, financial analysts, print media, and shareholders (Hill & Knowlton 2002, p. 25). CEOs of companies in the energy, utilities, financial services, and health care fields noted that they are strongly influenced by regulators. Overall, however, the responding CEOs ranked customers, employees, and CEO reputation as the top three motivators.

Empirical studies show that corporations on *Fortune* magazine's annual list of most admired corporations are shrouded in a financial halo (Brown and Perry 1994; Black, Carnes, and Richardson 1999). Edvinsson and Malone (1997) note, "Somehow, if only by hunches and intuitions, the market is putting a value on invisible assets [such as reputation]. And some of these qualitative assets seem to hover in the ether almost indefinitely, converting to line items on the balance sheet years after the market has accounted for them." Some researchers have verified that a correlation exists between high returns and good reputation (Black, Carnes, and Richardson 1999). Even though the financial literature does not unanimously conclude that good corporate citizenship results in better firm performance, shareholders have seized this intuitive concept and are lobbying corporations to act responsibly.

For example, shareholder activist Robert Monks has spearheaded the ExxonMobil Campaign, which charges that "ExxonMobil's attitude toward climate change is fraught with 'unnecessary risks and missed opportunities' that could put at risk more than \$100 billion in long-term shareholder value in the company" (Campaign ExxonMobil 2002). Monks, the Coalition for Environmentally Responsible Economies and Campaign ExxonMobil commissioned a report entitled, *Risking Shareholder Value? ExxonMobil and Climate Change: An Investigation of Unnecessary Risks and Missed Opportunities* (Campaign ExxonMobil 2002). The report concludes that, "While ExxonMobil continues to gain respect in many quarters for its financials, it has also marched into a potential minefield of reputational risk, future shareholder losses, exposure to litigation, and policy costs on the issue of climate change . . . We find real and increasingly serious risks to shareholders that have arisen from the way ExxonMobil has stood out from the crowd and let itself become the obvious chief 'climate change villain'" (Campaign ExxonMobil 2002, p. 4). The report provides justification for shareholders who wish to challenge ExxonMobil to act responsibly

on climate change issues so as to avoid a decline in share value because of reputational harm.

Human rights violations are also increasingly affecting multinational corporations' reputations and shareholder value. For example, in 2002 the Ninth Circuit Court of Appeals held that 11 Burmese villagers could sue Unocal for its complicity in forced labor, murder, rape, and torture at the company's construction of a Burmese pipeline (*Doe I v. Unocal Corp.*, 395 F. 3d 932 (9th Cir. 2002), *dismissed on reh. en banc*, 403 F. 3d 708 (9th Cir. 2005)). Paul Hoffman, the villagers' attorney stated: "This decision is important not only because it allows a U.S. company to be held liable for abuses committed overseas, but also because it tells other multinational corporations that go into business with repressive dictatorships that they are responsible if they assist their partners' abuses" (Earthrights 2002). Co-counsel added: "This ruling puts the plaintiffs one step closer to having their day in court. We are confident that a jury reviewing the facts of this case will be horrified. We expect a huge verdict on their behalf" (Earthrights 2002). Such corporate conduct has an effect on the corporation's reputation and its bottom line. Unocal settled the lawsuit three years later for an undisclosed amount, which is estimated to exceed \$15 million.<sup>4</sup> Katie Redford, a lawyer for Earthrights, announced "Companies have been able to mislead themselves and the public that human rights concerns would not affect their bottom line. That's just not the case anymore" (Eviatar 2005).

## **TACTICS TO ENCOURAGE RESPONSIBLE CORPORATE CITIZENSHIP**

Richard Ferlauto, Director of Pension and Benefit Investment Policy with AFSCME, has developed a continuum of pension fund activism (Table 14.1). We will look at the various tactics along this continuum, starting with the most passive and proceeding to the most aggressive tactics.



**Table 14.1 Continuum of Pension Fund Activism**

Inactive trustees	Management-oriented trustees	Trustees who focus on corporate governance issues	Trustees who encourage corporate accountability	Pension fund activists
No effort to comply with fiduciary standards relating to proxy voting	Votes in support of management proposals	Drafts and adopts own proxy voting guidelines	Adopts principles such as the CERES and McBride principles <sup>a</sup>	Engages corporate directors in a dialog about corporate governance issues
Has not adopted proxy voting guidelines	Votes for management slate of directors	Monitors executive pay	Encourages corporations to comply with basic workplace standards such as ILO standards	Sponsors shareholder proposals
	Uses policy guidelines developed by investment professionals	Monitors directors' performance	Considers social impact of board decisions	Uses focus lists to encourage better corporate performance
	Delegates proxy voting and corporate governance responsibility to investment professionals	Monitors proxy voting by professionals	Supports legislative reform requiring independent auditors	Uses litigation to remedy unlawful corporate conduct
	Does not monitor proxy voting by professionals		Encourages pay for performance	Works toward legislative reform on corporate accountability and financial transparency

<sup>a</sup>The CERES Principles were created by the Coalition of Environmentally Responsible Economies, a group of investors and environmental activists. Corporations may endorse these principles to show their commitment to environmental protection, including emissions reduction, environmental restoration, environmental sustainability, and responsible waste reduction. The principles can be found at <http://www.ceres.org/coalitionandcompanies/principles.php>. The McBride Principles are a code of corporate conduct designed to prevent religious discrimination by employers in Northern Ireland. Many pension funds have adopted investment policies that prohibit investment in a corporation that does business in Northern Ireland unless the corporation has adopted the McBride Principles.

## Silence of the Funds

The right to vote proxies is a plan asset. In Interpretive Bulletin 94-2, USDOL stated that trustees have a fiduciary duty to develop proxy voting guidelines and vote in accordance with those guidelines on proxy issues that are likely to have a financial impact on shares held by the pension fund. Common examples of proposals that affect stock value include reincorporation,<sup>5</sup> poison pills,<sup>6</sup> antitakeover devices,<sup>7</sup> and greenmail<sup>8,9</sup> (Securities and Exchange Commission 1984, 1985; Pound 1987, p. 362). Since most shareholder and management proposals would likely affect stock value if adopted, a strong argument can be made that trustees must vote on all proxies, or must delegate their authority to vote to investment professionals who will vote on the proxies in accordance with the fund's guidelines.

Many trustees delegate this activity to mutual funds that consistently vote with management but refuse to disclose their vote.<sup>10</sup> Vanguard Group founder John Bogle calls this phenomenon "Silence of the Funds" (Brown 2002). For example, mutual fund Fidelity Investments is the largest institutional holder of Nabors Industries and holds over \$537 million (10.55 percent) of Nabors' shares. Fidelity also holds 7.6 percent (over \$266 million) of Stanley Works and 5.33 percent (\$1.4 billion) of Tyco International. These corporations held votes on reincorporating in Bermuda to avoid U.S. taxes. Tyco and Nabors have already reincorporated in Bermuda, as did Fidelity in the 1960s. In that 1988 letter to Helmuth Fandl, chairman of the retirement board of Avon, the USDOL clearly stated that trustees have a duty to vote on reincorporation issues. Yet, until recently it appears that not only has Fidelity voted in support of management and against the interests of shareholders, but it has refused to inform the shareholders of the nature of its vote (AFL-CIO 2002).

Fidelity, which manages assets of \$859.8 billion, or 12.5 percent of the market share (AFL-CIO 2002), excuses its conduct by saying that disclosure of proxy voting guidelines and votes could impact the company's stock price. That's precisely the point that pension activists have been making, and it is the basis for the USDOL's mandate that trustees vote on proxies that may affect stock value. Instead, Fidelity used this argument to support its refusal to disclose its proxy voting records to the beneficial owner of the stock. Fidelity said that its voting

records are “proprietary information” and thus, not disclosable (Lauricella and Schroeder 2002). Fidelity’s argument, however, flies in the face of USDOL’s Interpretive Bulletin, which implies that delegation of proxy voting authority without monitoring to make sure the proxy is voted in such a manner as to increase shareholder value is a breach of fiduciary duty.

Investment managers and mutual fund managers such as Fidelity often face a conflict of interest in voting proxies. Fidelity has 9,600 clients and manages 7.8 million 401(k) accounts (Kirchhoff 2002). As the largest provider of 401(k) plans, Fidelity has an incentive to vote with management so that management will continue to offer Fidelity as one of their 401(k) vendors (AFL-CIO 2002). Reporter Steven Syre calls Fidelity the “ultimate fund management fee machine” (Syre 2002). Fees for Fidelity’s largest mutual fund alone totaled \$556.3 million in 2001 (Syre 2002). According to Mercer Bullard, founder of Fund Democracy, mutual funds “serve two masters” and “may avoid taking a stand against company management for fear of losing pension plan business” (Friedman 2002; Day 2002). At the urging of the AFL-CIO, the Securities and Exchange Commission voted to require mutual fund managers to disclose publicly how they cast proxy votes on behalf of their investors (Securities and Exchange Commission 2003). In September 2004, the AFL-CIO released a report entitled, *Behind the Curtain: How the 10 Largest Mutual Fund Families Voted when Presented with 12 Opportunities to Curb CEO Pay Abuse in 2004*. According to the report, Fidelity ranked 9th out of 10 in the survey, voting to curb CEO pay only 25 percent of the time (AFL-CIO 2004).

### **Meeting with Management**

Not only does USDOL believe that trustees must vote proxies, it has stated that trustees should meet with management on corporate governance issues whenever “the responsible fiduciary concludes that there is a reasonable expectation that such monitoring or communication with management, by the plan alone or together with other shareholders, is likely to enhance the value of the plan’s investment in the corporation, after taking into account the costs involved” (USDOL 1994). USDOL acknowledges that where a pension fund is a long-term investor in an index fund, “the prudent exercise of proxy voting rights or other forms

of corporate monitoring or communication may be the only method available for attempting to enhance the value of the portfolio” (USDOL 1994). Other issues that USDOL considers appropriate topics of conversation with management include “the appropriateness of executive compensation, the corporation’s policy regarding mergers and acquisitions, the extent of debt financing and capitalization, the nature of long-term business plans, the corporation’s investment in training to develop its work force, other workplace practices, and financial and non-financial measures of corporate performance” (USDOL 1994). Workplace practices would include the corporation’s attitude toward unionization.

Management meetings work. For example, in the 2003 proxy season, pension funds and unions negotiated settlement of shareholder resolutions with 105 corporations. Thirty-one corporations, including Halliburton, Caterpillar, and Reebok, negotiated agreements on expensing stock options. Although a small number, it is quite remarkable that in light of the AFL-CIO/AFSCME/CalPERS “Come Home to America” campaign, three corporations (Transocean, Schlumberger, and McDermott) agreed to discuss reincorporation in the United States. Seven leading underwriting firms including J.P. Morgan & Chase, Goldman Sachs, Merrill Lynch, Morgan Stanley, Lehman Brothers, and Citigroup agreed to analyst independence. And because shareholder votes are not binding, two corporations agreed, at the request of NYCERS, to adopt proposals supported by majority vote. The AFL-CIO reached agreement with four corporations on chairman independence. Twenty-three corporations settled shareholder resolutions requesting performance-based options (Georgeson 2003; Investor Responsibility Research Corporation 2003).

While fund-sponsored corporate governance proposals frequently pass, the success rate for social proposals is infrequent. A common shareholder proposal calls for the targeted corporation to adopt International Labour Organization (ILO) standards:

- **RESOLVED:** The shareholders request that the board of directors of the Coca-Cola Company . . . adopt an enforceable policy to be followed by the company, its subsidiaries, bottlers, and distributors with respect to operations in Columbia, said policy to be based on ILO’s declaration on fundamental principles and rights at work and to include the following:

- All workers have the right to form and join trade unions and bargain collectively (Conventions 87 and 98).
- There shall be no discrimination or intimidation in employment . . . (Conventions 100 and 111).
- Employment shall be freely chosen. There shall be no use of forced, including bonded or voluntary prison, labor or of child labor (Conventions 29 and 105, 138 and 182) (Coca-Cola Company 2003).

In the 2003 proxy season, unions and funds filed shareholder proposals at seven companies, calling for adherence to the ILO standards. Agreements were reached at Sears and Unocal. Although the other proposals did not pass, the resolution at Hudson's Bay received a stunning 36.8 percent.

Perhaps the most important event in the 2003 proxy season occurred in May 2003, when competing slates of directors for El Paso, an energy company that provides natural gas and other energy-related products, met with pension fund investment managers at the headquarters of the AFL-CIO to explain their corporate philosophy and long-term corporate goals. As a result of the meeting, pension funds endorsed the competing slate of directors. The insurgents lost by a narrow margin and tabulators recounted the vote (Perin 2003). Even though the final tally declared the incumbents victors, the pension fund shareholders were truly the victors since they garnered enough votes to make them influential in the shareholder vote.

### **Using Pension Fund Activism to Encourage Organizing**

The most common tactic pension fund activists use to create union jobs is the Responsible Contractor Policy. The Service Employees International Union (SEIU), CalPERS, and the New York State Common Retirement Fund have adopted Responsible Contractor Policies which require all fund real estate holdings, loans, or maintenance contracts, to contain an agreement that all work performed on the fund property will be done in accordance with all applicable labor laws. As the SEIU policy puts it,

[i]n order to ensure a competitive return on its real estate investments, the Fund seeks to invest in properties that are well-run and

maintained where tenants receive high quality services . . . Assuring the availability of a qualified staff and avoiding labor disruption and costly employee turnover requires employers to pay fair and reasonable compensation, to treat workers fairly and abide by applicable labor laws. (SEIU 1998)

Similarly, the New York Common Retirement Fund has a contractor selection program that emphasizes the fund's "deep interest in the condition of workers employed by the fund and its advisors" (New York Common Retirement Fund 1998). The policy requires investment managers to hire program contractors who pay "workers a fair wage and a fair benefit as evidenced by payroll and employee records, and who compl[y] with the fund's minority and women business policy" (New York Common Retirement Fund 1998). Although these policies do not literally require union representation of building and maintenance workers, they have had this effect.

Responsible contractor policies give hiring preferences to employers who pay their workers a fair wage and provide employer-paid health insurance, pension benefits, and training opportunities. By adopting a responsible contractor policy, pension funds can meet their fiduciary duty to achieve a competitive rate of return while ensuring the fair treatment of employees working on their properties.

Building trade unions use another tactic: they buy raw land, build the project union, and sell the property with a responsible contractor clause. This tactic is not limited to the building trade unions, however, because pooled real estate funds such as the AFL-CIO Housing Investment Trust (HIT) and Building Investment Trust (BIT) accomplish the same result by offering commingled funds that guarantee union work. During the 10-year period from 1993–2003, BIT has generated over 11 million hours of union construction as well as union jobs for the members of 17 AFL-CIO unions in the construction, servicing, and maintenance of properties. As of March 31, 2003, BIT's net assets exceeded \$1.5 billion and were invested in nearly 12 million square feet of commercial development in the communities where union members live and work (HIT 2003).

## **Sponsoring Shareholder Proposals**

The USDOL also encourages trustees to sponsor shareholder proposals where the proposal may affect the corporation's stock value (USDOL 1994). In the 2003 proxy season, trustees of pension funds and union representatives filed approximately 381 shareholder proposals, more than double the proposals filed in 2002. Sixty-nine labor-sponsored proposals passed and settlements were reached on 105 proposals. The AFL-CIO won majority support for its resolutions on executive pensions at U.S. Bancorp (52 percent), golden parachutes<sup>11</sup> at Alcoa (65 percent), and shareholder approval of severance plans at Tyco (57.7 percent). Although its proposal at United Technologies only garnered 47 percent of the vote, the company agreed to review its policy on golden parachutes. The Culinary Workers scored big at The Cheesecake Factory, winning proposals to submit stock option plans<sup>12</sup> to shareholder vote (66 percent), require annual election of directors (72 percent), submit a poison pill to shareholder vote (67 percent), and eliminate the 80 percent supermajority voting requirement<sup>13</sup> (81 percent). The Teamsters won stock option expensing<sup>14</sup> proposals at Coke Enterprises, PPG Industries, and Weyerhaeuser, and the Carpenters won 78 percent support for a similar resolution at Exxon Mobil. AFSCME settled a proposal on golden parachutes at Electronic Data Systems. Other victories include BellTel Retirees' proposal for shareholder approval of severance plans at Verizon (59 percent) and Connecticut Retirement Plans' proposal to declassify the board at Reebok (63 percent) and Stanley (55 percent). Certainly, it was a successful year for shareholder activists.

Table 14.2 lists pension fund and related shareholder proposals that passed in 2003. This table may understate the funds' success rate because it does not include the 105 resolutions that corporations agreed to in principle and, therefore, were withdrawn. Also, fund-sponsored shareholder proposals at 35 corporations that did not pass received votes in excess of a third of shareholders (a stunning amount, especially for first-time proposals).

## **Encouraging Legislative Reform**

Pension funds have been among the prime movers in the fight to enact legislation that addresses corporate accountability and transpar-

ency. For example, as part of its legislative agenda, CalPERS will do the following:

- 1) Actively oppose the election of any director who, while sitting on the company's audit committee, approved retaining an external audit firm when that firm also provides consulting or internal audit services to a company.
- 2) Publicly oppose shareholder approval of any auditor that has been retained by the company for more than five years, or also performs consulting or internal audit services to the company. CalPERS believes that current moves by the accounting industry to separate their consulting relationships from their auditing relationships is too late and too narrowly defined to accomplish the overall goal of restoring confidence in the industry.
- 3) Join forces with other significant users of financial statements to provide concrete and responsible proposals for accounting standards reform to Congress, the Securities & Exchange Commission, the Financial Accounting Standards Board, the International Accounting Standards Board and the American Institute of Certified Public Accountants.
- 4) Form a commission made up of regulators, legislative representatives, and investors to examine ways in which conflicts of interests (by investment banks, equity analysts, rating agencies, lending institutions, outside attorneys and other consultants) can be identified, disclosed and managed.
- 5) Immediately prepare, promote, and pursue proposals within Congress, the SEC and Exchanges that truly strengthen and clarify the meaning and importance of an "independent" director (CalPERS 2002b).

Many of CalPERS' legislative proposals were adopted as part of the Sarbanes-Oxley Act of 2002 (CalPERS 2002a).

### **Shareholder Litigation**

In conventional shareholder litigation, the plaintiff typically claims that the corporate issuer violated federal securities law by engaging in fraud with respect to SEC filings. For example, CalPERS, the Cali-



**Table 14.2 Pension Fund and Related Shareholder Proposals That Passed in 2003 as of November 14, 2003, Tally**

Company	Proposal	Sponsor	Vote
AK Steel	Approval of severance	Longview Fund	59.2
Alcoa, Inc.	Approval of severance	AFL-CIO	64.7
Apple Computer	Expense stock options	UBC	56.4
Arden Realty	Submit poison pill to shareholder (SH) vote	SEIU	83.0
Avon Industries	Expense stock options	IBEW	56.4
Black & Decker	Expense stock options	UBC	52.0
Boston Scientific	Performance-based exec. comp.	Sheet metal workers	90.1
Capital One Financial	Expense stock options	UBC	55.0
Calpine	Repeal classified board	IBEW	62.8
Calpine	Submit poison pill to SH vote	Plumbers, Pipefitters	66.3
CenterPoint Energy	Performance-based exec. comp.	Sheet metal workers	75.5
The Cheesecake Factory	Submit executive comp. plans for approval	Culinary workers	56.4
The Cheesecake Factory	Annual election of directors	Culinary workers	62.0
The Cheesecake Factory	Submit poison pill to SH vote	Culinary workers	57.7
The Cheesecake Factory	Eliminate supermajority vote	Culinary workers	69.6
Circuit City Stores	Submit poison pill to SH vote	AFSCME	79.3
Citrix Systems	Expense stock options	LIUNA	54.8
Coke Enterprises	Expense stock options	IBT	Majority
Covance	Declassify board	NYCERS	72.3
Crescent Real Estate Equities	Declassify board	SEIU	72.7
Delta Airlines	Expense stock options	Delta pilots	61.4
Delta Airlines	Approval of severance	Delta pilots	54.3
Eastman Kodak	Expense stock options	LIUNA	56.3

Company	Proposal	Sponsor	Vote
Equifax	Expense stock options	UBC	60.7
Exxon Mobil	Expense stock options	UBC	78.0
Fluor	Expense stock options	UBC	79.7
Genzyme Corp.	Expense stock options	UBC	63.2
Georgia Pacific	Expense stock options	IBT General Fund	65.0
Hercules	Authorize written consent	NYC Firefighters	63.1
Hewlett-Packard	Approval of severance	SEIU	52.4
International Paper	Approval of severance	AFL-CIO	61.0
Kilroy Realty	Submit poison pill to SH vote	SEIU	87.1
Kimberly-Clark	Expense stock options	UBC	53.0
Kohl's	Expense stock options	UBC	50.6
Lowe's	Submit poison pill to SH vote	BAC	70.2
Manor Care	Declassify board	NYC Firefighters	71.8
Massey Energy	Approval of severance	Longview Fund	72.5
MBNA	Expense stock options	AFSCME	52.1
McKesson	Approval of severance	IBT	68.1
Mercury Interactive	Expense stock options	UBC	52.3
Mirant	Expense stock options	IBEW	61.7
NCR	Expense stock options	LIUNA	53.2
J.C. Penney	Expense stock options	LIUNA	52.0
Office Depot	Submit poison pill to SH vote	BAC	78.7
PPG	Expense stock options	IBT General Fund	52.4
Pitney Bowes	Submit poison pill to SH vote	AFSCME	62.2
Providian Financial Capital	Expense stock options	SMWIA	54.5
Raytheon	Approval of severance	AFL-CIO	66.4
Reebok	Declassify board	Connecticut Retirement Plans	63.0
RyderSystems	Submit poison pill to SH vote	AFSCME	76.6
Safeway	Expense stock options	Plumbers, Pipefitters	62.7

**Table 14.2 (continued)**

Company	Proposal	Sponsor	Vote
Safeway	Declassify board	Longview Fund	61.0
Sprint	Approval of severance	Longview Fund	63.7
Stanley Works	Declassify board	Connecticut Retirement Plans	55.0
Starwood Hotels	Expense stock options	IBEW	60.5
Supervalu	Expense stock options	UBC	64.3
Tellabs	Declassify board	Longview Fund	68.3
Thermo Electron	Expense stock options	SMWIA	59.7
Tyco International	Approval of severance	AFL-CIO	57.7
U.S. Bancorp	Executive pensions	AFL-CIO	51.6
U.S. Bancorp	Expense stock options	UBC	59.9
Union Pacific	Approval of severance	Longview Fund	56.8
United Technologies	Approval of severance	AFL-CIO	54.0
Veritas Software	Expense stock options	Plumbers, Pipefitters	64.3
Verizon	Approval of severance	BellTel Retirees, Inc.	59.0
VF	Declassify board	Longview Fund	56.7
Wells Fargo	Abolish stock option	AFL-CIO	56.3
Weyerhaeuser	Expense stock options	Teamsters	50.0
Whole Food Markets	Declassify board	Longview Fund	60.5
Yahoo!	Submit poison pill to SH vote	Longview Fund	56.2

NOTE: AFL-CIO = American Federation of Labor–Congress of Industrial Organizations; AFSCME = American Federation of State, County and Municipal Employees; BAC = Bricklayers and Allied Craftworkers; IBEW = International Brotherhood of Electrical Workers; IBT = International Brotherhood of Teamsters; LIUNA = Laborers' International Union of North America; NYCERS = New York City Employees' Retirement System; SEIU = Service Employees International Union; SMWIA = Sheet Metal Workers International Association; UBC = United Brotherhood of Carpenters and Joiners of America.

SOURCE: Compiled from various sources including *Georgeson Shareholder, Annual Corporate Governance Review: Shareholder Proposals and Proxy Contests* (2002) and *Investor Responsibility Corporation 2003 Vote Results*. This table was originally published in Zanglein and Clark (2004).

ifornia Teachers' Retirement System (CalSTRS), and the Los Angeles County Employees Retirement Association recently sued WorldCom for losses exceeding \$300 million with respect to fraudulent statements made in the prospectus issued for the sale of corporate bonds in May 2001 (CalPERS 2002c). Likewise, the law firm of Milberg Weiss, a class-action specialist, filed a class-action lawsuit against Enron seeking to recover losses relating to Enron's fraudulent statements.

An example of an innovative use of securities litigation can be found in the action brought against Phelps Dodge by the Steelworkers. The lawsuit, filed during impasse of the union's collective bargaining agreement, alleged that Phelps Dodge violated federal securities laws when it understated environmental liability in its reports to shareholders. (In *re Phelps Dodge, Inc.*, SEC File No. 001-00082 (undated circa 1998)). ICEM General Secretary Vic Thorpe stated "Phelps Dodge has continued to show its disdain for its stakeholders. It's time they realize that bad corporate behavior is bad for business."<sup>15</sup> At the company's annual shareholder meeting USWA President Leo Girard said, "Phelps Dodge's environmental clean-up obligations hang like a sword of Damocles over the investing public."<sup>16</sup> While the lawsuit was later dropped, it did influence other groups to propose expanded environmental and social disclosure requirements to the Securities and Exchange Commission.

### **Revocation of Corporate Charters**

Perhaps the most aggressive action taken against a corporation is the attempted revocation of Unocal's corporate charter. In 1998, Robert Benson, on behalf of the National Lawyers Guild, filed a petition with the Attorney General for the State of California to revoke Unocal's charter. Petitioners contended that the charter should be revoked because, among other things, Unocal

- has been identified as a potentially responsible party at 82 "Superfund" or similar toxic sites;
- has committed hundreds of Occupational Safety and Health Act violations in the last 12 years;
- has treated U.S. workers unethically and unfairly; and
- carries on ventures with foreign business partners in a fashion that makes the company complicit in and legally liable for their

partners' unspeakable human rights violations against women, gays, laborers, villagers, ethnic minorities, and indigenous people (Benson 1999).

While the petition has been unsuccessful, it has heightened public awareness that a corporate charter is granted by the state and can be revoked by the state. It has also increased political pressure on Unocal, which has been targeted by activists for its human rights violations in Burma.

## CONCLUSION

In the 12 years since the USDOL issued Interpretive Bulletin 94-2 encouraging pension funds to become shareholder activists, many trustees have taken the lead. However, far more trustees are lagging behind because they have neither the resources nor the education to implement these strategies. Additionally, most plans do not have worker representatives who can promote these issues.<sup>17</sup>

Trustees should take comfort in the fact that the USDOL has encouraged shareholder activism and has stated that trustees are not required to take the "quick buck" but may base their decisions on the long-term best interests of the corporation. Trustees can use this statement in support of their increased demands for corporate accountability. In addition, trustees should take advantage of the public's current demand for corporate transparency and accountability to compel directors to adopt measures that will increase the long-term value of the corporation. In a 1999 survey of the most respected companies, CEOs listed "increased pressure from stakeholder groups" as the second most important upcoming business challenge (Grayson and Hodges 2002, p. 74). Corporations are facing increased attention in the form of shareholder resolutions, and pressure from institutional investors, nongovernmental organizations, regulatory agencies, consumers, and the public (Grayson and Hodges 2002, pp. 217–218). As one author put it, "Customers and employees care. That means the equity markets care. And that means

CEOs care” (Grayson and Hodges 2002, p. 78). And if they don’t care, pension trustees and activists can motivate them through tactics such as shareholder resolutions, corporate dialogue, corporate campaigns, and litigation.

## Notes

Portions of this chapter are adapted, with permission, from Zanglein and Clark (2004).

1. Although public funds are excluded from ERISA coverage, these standards are still applicable as they are contained in the Internal Revenue Code, the Uniform Management of Public Employees Retirement System Act, and state laws, which incorporate these duties.
2. Trustees may delegate their proxy voting authority, but if they do, the trustees should adopt proxy voting policies for their investment managers to follow and must monitor the managers’ votes.
3. Interbrand, a research company, estimates that 96 percent of Coca-Cola’s stock value is in intangibles such as reputation, knowledge, and brand. Kellogg’s stock value is 97 percent in intangibles, American Express 84 percent, and IBM 83 percent. Rita Clifton, CEO of Interbrand, says “Brand equity is now a key asset.” Brand alone, accounts for 59 percent of Coke’s stock value, 64 percent of McDonald’s, and 61 percent of Disney’s value (Grayson and Hodges 2002).
4. Unocal sued its reinsurer for reimbursement for claims in excess of \$15 million, leading experts to conclude that Unocal’s costs were significantly higher than \$15 million (Eviatar 2005).
5. By reincorporating, a corporation chooses to reincorporate in another state or country (most notably the Bahamas or the Cayman Islands) that has less restrictive corporate laws and lower (or nonexistent) corporate taxes.
6. Poison pills are shares issued to current shareholders at extremely low prices to encourage shareholders to buy the new shares, with the result that the raider must buy more shares at a higher price.
7. Antitakeover devices are charter and bylaw amendments that make it more difficult for a corporation to be taken over.
8. Greenmail is money paid to a corporate raider to “go away.”
9. Letter from the Department of Labor to Helmuth Fandl, Chairman of the Retirement Board of Avon Products, Inc. February 23, 1988.
10. Letter from Harvey Pitt, Chair, Securities and Exchange Commission to John Higgins, President of Ram Trust Services. Feb. 12, 2002.
11. Golden parachutes are severance payments made to management employees on termination or change of control and are designed to “soften the landing” by providing gold.
12. Stock option plans are generally provided to upper management and grant the

employee the right to buy company stock at a stated exercise price. In the event the stock price rises, the employee can profit by purchasing stock at the lower exercise price. Stock options are subject to abuse when the board of directors agree to reprice the stock options so that the executives can profit even when the corporation is not profiting.

13. Supermajority voting requirements are usually placed on changes of corporate control such as mergers and acquisitions.
14. Funds have been lobbying corporations to expense stock options as this requires the corporation to include the costs of issuing stock options in their financial reports.
15. “*Showdown at Phelps Dodge.*” Available at <http://www.icemna.org/ephelps3.htm> (accessed December 1999).
16. See note 14.
17. Legislative proposals, such as the Visclosky bill, H.R. 323 (108th Congress) which would provide joint trusteeship for single employer plans, would significantly enhance the ability of workers to become pension activists and push for policies such as responsible contractor policies.

## References

- AFL-CIO. 2002. “What is Fidelity Investments Hiding?” <http://www.funddemocracy.com/What%20is%20Fidelity%20Hiding.pdf> (accessed Dec. 16, 2004).
- . 2004. “Behind the Curtain: How the 10 Largest Mutual Fund Families Voted when Presented with 12 Opportunities to Curb CEO Pay Abuse in 2004.” <http://www.aflcio.org/corporateamerica/capital/upload/BehindtheCurtain.pdf> (accessed December 16, 2004).
- Benson, Robert. 1999. *Challenging Corporate Rule: The Petition to Revoke Unocal’s Charter as a Guide to Citizen’s Action*. New York: Apex Press.
- Black, Ervin, Thomas Carnes, and Vernon Richardson. 1999. “The Market Value of Firm Reputation.” Working paper. <http://ssrn.com/abstract=158050> (accessed June 3, 2005).
- Brown, Ken. 2002. “Another Panel Targets Executive Pay.” *Wall Street Journal*. Sept. 18, C:5.
- Brown, Brad, and Susan Perry. 1994. “Removing the Financial Performance Halo from Fortune’s ‘Most Admired Companies.’” *Academy of Management Journal* 37(5): 1347–1359.
- Business Wire. 2001. “Americans are Looking for Good Corporate Citizens, But Aren’t Finding Them, According to Hill and Knowlton 2001 Corporate Citizen Watch.” *Business Wire*, July 3.
- California Public Employees Retirement System (CalPERS). 2002a. “Mem-

- orandum from CalPERS Investment Office to the Investment Committee.” Sept. 17. <http://www.calpers.ca.gov/whatsap/calendar/board/invest/200209/Item07a.doc> (accessed October 2002).
- . 2002b. “CalPERS Financial Market Reform Plan of Action.” [http://www.calpers-governance.org/enron/plan\\_action.asp](http://www.calpers-governance.org/enron/plan_action.asp) (accessed October 2002).
- . 2002c. “Press Release.” July 16. <http://www.calpers.ca.gov/whatsap/calendar/board/invest/200209/Item07a.doc> (accessed October 2002).
- Campaign ExxonMobil. 2002. “News Release.” May 2. <http://www.campaignexxonmobil.org/news/PR.050202.html> (accessed December 16, 2004).
- Coca-Cola Company. 2003. “2003 Proxy Statement.” Amalgamated Bank Long-View Collective Investment Fund. Share-Owner Proposal Regarding Company Policy in Columbia (Item 11). [http://www2.coca-cola.com/investors/2003\\_proxy\\_statement.pdf](http://www2.coca-cola.com/investors/2003_proxy_statement.pdf) (accessed December 16, 2004).
- Day, Kathleen. 2002. “New Rules May Force Disclosure On Votes; Mutual Funds’ Proxies Guide Many Companies.” *Washington Post*, Sept. 19, E1.
- Earthrights. 2002. “Unocal Can Be Held Liable for Human Rights Violations in Burma, Court Says.” Press Release. Sept. 18. <http://www.earthrights.org/news/unocalsept19pr.html> (accessed December 2002).
- Edvinsson, Leif, and Michael S. Malone. 1997. *Intellectual Capital: Realizing Your Company’s True Value by Finding its Hidden Brainpower*. New York: HarperBusiness.
- Eviatar, Daphne. 2005. “A Big Win for Human Rights.” *The Nation*. <http://www.thenation.com/doc.mhtml?i=20050509&s=evitar> (accessed June 3, 2005).
- Friedman, Josh. 2002. “SEC Proposes Proxy Vote Disclosure Rule.” *L.A. Times*, Sept. 20, C:9.
- Georgeson Shareholder. 2003. “Annual Corporate Governance Review: Shareholder Proposals and Proxy Contests.” New York: Georgeson Shareholder.
- Grayson, David, and Adrian Hodges. 2002. *Everybody’s Business: Managing Risks and Opportunities in Today’s Global Society*. New York: Financial Times/DK Publishing Inc.
- Hawley, James P., and Andrew T. Williams. 2000. *The Rise of Fiduciary Capitalism: How Institutional Investors Can Make Corporate America More Democratic*. Pennsylvania: University of Pennsylvania Press.
- Hill & Knowlton. 2002. “Third Annual Corporate Reputation Watch.” [http://www.hillandknowlton.com/common/file.php/pg/duck/hnk\\_global/binaries/25/HK\\_percent202002\\_percent20Corp\\_percent20Rep\\_percent20Watch.pdf](http://www.hillandknowlton.com/common/file.php/pg/duck/hnk_global/binaries/25/HK_percent202002_percent20Corp_percent20Rep_percent20Watch.pdf) (accessed December 16, 2004).
- Housing Investment Trust (HIT). 2003. “HIT Annual Report.” <http://www.afl->



- cio-hit.com/pdf/HIT\_Annual03\_final.pdf (accessed December 16, 2004).
- Investor Responsibility Research Center. 2003. "2003 Vote Results." Paper available to subscribers. Washington, DC: Investor Responsibility Research Center.
- Jacobius, Arleen. 2003. "Trillions and Trillions: Rollover Money to Eclipse DB and DC Plans' Assets; IRAs Will Be Beneficiaries of Huge Pool Created by Decades of Participation" *Pensions & Investments*.
- Kirchhoff, Sue. 2002. "401(k) Fight Raging Over Conflict." *Boston Globe*, March 30, B:7.
- Lauricella, Tom, and Michael Schroeder. 2002. "SEC to Consider Rule on Voting By Mutual Funds." *Wall Street Journal*, Sept. 16 C:1.
- New York Common Retirement Fund. 1998. "Contractor Selection Program."
- New York Stock Exchange (NYSE). 2000. "Shareownership 2000." [http://www.nyse.com/marketinfo/p1020656068262.html?displayPage=percent-2Fmarketinfo percent2Fmarketinfo.html](http://www.nyse.com/marketinfo/p1020656068262.html?displayPage=percent-2Fmarketinfo%2Fmarketinfo.html) (accessed December 13, 2004).
- Perin, Monica. 2003. "El Paso Management Facing Uphill Battle after Proxy Fight." *Houston Business Journal*, June 23. <http://houston.bizjournals.com/houston/stories/2003/06/23/story6.html> (accessed December 16, 2004).
- Pound, John. 1987. "The Effects of Antitakeover Amendments on Takeover Activities: Some Direct Evidence." *Journal of Law & Economics*. 30: 353.
- PR Newswire Association. 2000. "U.S. Investor Assets Reach \$18.6 Trillion in 1999 Nearly Tripling Since 1990." *PR Newswire*, December 5.
- Reichheld, Frederick F. 2002. "September 11's Loyalty Dividend." *Wall Street Journal*, Sept. 10.
- Schneyer, Fred. 2003. "ICI: Funds Clung to Retirement Market Share in 2002." *Plan Sponsor*. July 1. [http://www.plansponsor.com/pi\\_type10/?RECORD\\_ID=21346](http://www.plansponsor.com/pi_type10/?RECORD_ID=21346) (accessed December 16, 2004).
- Securities and Exchange Commission, Office of the Chief Economist. 1984. *The Impact of Targeted Share Repurchases (Greenmail) on Stock Prices*. Washington, DC: U.S. Securities and Exchange Commission.
- . 1985. *Shark Repellants and Stock Prices: The Effect of Antitakeover Amendments-Since 1980*. Washington, DC: U.S. Securities and Exchange Commission.
- . 2003. "Final Rule: Disclosure of Proxy Voting Policies and Proxy Voting Records by Registered Management Investment Companies." SEC Release 33-8188. <http://www.sec.gov/rules/final/33-8188.htm> (accessed April 21, 2005).
- Service Employees International Union (SEIU). 1998. *Responsible Contractor Policy*. Washington, DC: Service Employees International Union.
- Syre, Steven. 2002. "A Piece of the Action" *Boston Globe*, May 23, C:1.
- U.S. Department of Labor, Pension & Welfare Benefits Administration

- (USDOL). 1994. *Interpretive bulletin 94-2 relating to written statements of investment policy, including proxy voting policy or guidelines*, 29 C.F.R. § 2509.94-2. Washington, DC: U.S. Department of Labor.
- Zanglein, Jayne, and Denise Clark. 2004. *Capital Stewardship and Fund Governance*. Washington DC: AFL-CIO Center for Working Capital.



**Justice on the Job**  
**Perspectives on the Erosion**  
**of Collective Bargaining**  
**in the United States**

Richard N. Block  
Sheldon Friedman  
Michelle Kaminski  
Andy Levin  
*Editors*

2006

W.E. Upjohn Institute for Employment Research  
Kalamazoo, Michigan

## Library of Congress Cataloging-in-Publication Data

Justice on the job : perspectives on the erosion of collective bargaining in the United States / Richard N. Block . . . [et al.].

p. cm.

Includes bibliographical references and index.

ISBN-13: 978-0-88099-278-7 (pbk. : alk. paper)

ISBN-10: 0 88099-278-6 (pbk. : alk. paper)

ISBN-13: 978-0-88099-279-4 (hardcover : alk. paper)

ISBN-10: 0-88099-279-4 (hardcover : alk. paper)

1. Collective bargaining—United States. 2. Labor unions—United States. 3. Job security—United States. 4. Employee rights—United States. 5. Industrial relations—United States. I. Block, Richard N.

HD6508.J87 2006

331.890973—dc22

2005033299

© 2006

W.E. Upjohn Institute for Employment Research  
300 S. Westnedge Avenue  
Kalamazoo, Michigan 49007-4686

The facts presented in this study and the observations and viewpoints expressed are the sole responsibility of the author. They do not necessarily represent positions of the W.E. Upjohn Institute for Employment Research.

Cover design by Alcorn Publication Design.

Index prepared by Diane Worden.

Printed in the United States of America.

Printed on recycled paper.