



Back to School – Remembering the 4 Rs: RIFs, Remote Work, Requests for Accommodations, and Recruitment in Uncertain Times

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An Essential Resource for Employers



Agenda

- I. Workforce at a Glance
- II. Remote Work
- III. Out of State Workers
- IV. Hiring/Retention Strategies
- V. Questions



Workforce at a Glance

Unemployment, Economic Predictions & Hot Topics

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Current Unemployment Rates

	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
2018	4.0	4.1	4.0	4.0	3.8	4.0	3.8	3.8	3.7	3.8	3.8	3.9
2019	4.0	3.8	3.8	3.6	3.6	3.6	3.7	3.7	3.5	3.6	3.6	3.6
2020	3.5	3.5	4.4	14.7	13.2	11.0	10.2	8.4	7.9	6.9	6.7	6.7
2021	6.4	6.2	6.0	6.0	5.8	5.9	5.4	5.2	4.7	4.6	4.2	3.9
2022	4.0	3.8	3.6	3.6	3.6	3.6	3.5	3.7	<u>3.5</u>			

Inflation

The current median weekly earnings of full-time wage and salary workers is **\$1,070**, which is **6.9% higher** than 2021.

Compared with a **gain of 8.3%** in the Consumer Price Index for All Urban Consumers (CPI-U) over the same period.

Economic Predictions

- The U.S. economy is projected to add **8.3 million jobs** from 2021 to 2031.
 - Total employment is projected to **increase from 158.1 million to 166.5 million.**
 - Growth is predicted to **increase 0.5% annually**, which is slower than the 1.0% annual growth recorded between 2011 and 2021.
- Labor force participation rate is projected to continue to trend down, **declining from 61.7% in 2020 to 60.4% in 2030.**

Economic Growth Predictions

Wage and Salary Predictions

- Average hourly earnings have increased by **5.0%** in the last 12 months.
- The **leisure and hospitality sector** is predicted to have the fastest growing wages & salaries, specifically:
 - The **promotion of events**, agents, and managers industry;
 - The **amusement parks** and arcades industry; and
 - The **performing arts** industry.
- Other industries anticipated to see significant growth in wage & salaries:
 - **Individual and family services** (health care and social assistance sector);
 - Support activities for **mining**; and
 - Support activities for **agriculture and forestry**.

Is A Recession in the Works?

- The Conference Board reported that its measure of **CEO Confidence**[™] declined for a fifth consecutive quarter in Q3 2022.
- The Q3 survey asked CEOs about the economy they expected the companies to face over the next 12-18 months.
 - 81% expect a brief/shallow recession
 - 12% expect a deep/longer lasting recession
 - 7% do not expect any recession

Remote Work

What Does the Modern Workplace Look Like?

Breakdown of Company Policies on Remote Work

- **32%** Fully remote policy with employees working in their native time zones;
- **12%** Fully remote policy with employees working on a synchronized time zone mandated by employer;
- **42%** Hybrid-remote policy; and
- **14%** have no official remote work policy.

Employee Attitudes on Remote Work

“Talent Flows Where Flexibility Reigns”

- **52%** of remote workers would consider leaving their hybrid work environment for a remote role.
- **1 in 3** respondents would leave their job if remote work was suddenly no longer an option.
- **82%** of remote employees praised their leadership for understanding how to operate a team remotely.

Top 3 benefits of remote work according to employees:

- Increased productivity;
- Increased efficiency;
and
- Increased employee morale.

Undecided Issues Created by “The Great Relocation”

- Nearly 1 in 3 remote workers plan to relocate or to work from abroad.
 - Remote workers could subject the employer to **unfamiliar rules and regulations covering various aspects of employment, including:**
 - § Daily overtime;
 - § Enforceability of non-compete agreements and post separation payments;
 - § PTO carryover;
 - § Family leave rights;
 - § 1099 misclassifications; and
 - § Unemployment compensation.



Remote Work Expenses

- Two cases in California allege state labor code violations regarding expenses incurred while working from home.
 - ***Calderon v. Wells Fargo Bank, N.A.*, 2:21-cv-04430 (C.D. Cal.)**
 - § Raise questions over employers' obligation to pay cell phone bills, Internet connections, and even portions of employees utility bills.
 - ***Williams v. Amazon.com Services LLC et al*, 3:22-cv-01892 (N.D. Cal)**
 - § Employees allege Amazon violated state labor laws by failing to come up with a policy to compensate employees for remote work related expenses.

Other Legal Issues Related to Remote Work

- Increased ADA requests for accommodations based on psychological and emotion impairments.
- Requested accommodations based on impairments brought on by COVID-19 (i.e., long covid).
- Is a fully remote accommodation now considered reasonable under the ADA?
- Not yet been addressed by the courts, but the EEOC has signaled its interest in this subject.

And many more! We will address other issues in the next sections.

Accommodations under the Americans with Disabilities Act

- Courts have not yet had many opportunities to address remote work as an ADA accommodation post-COVID.
 - General ADA principles would continue to apply in these cases:
 - § A **reasonable accommodation** is a modification or adjustment to a job, the work environment, or the way things are usually done during the hiring process. Accommodations are considered “reasonable” if they do not create an **undue hardship** or a **direct threat**. 29 C.F.R. § 1630.2(o).
 - § It is not a change to an **essential function** of a job – i.e., the fundamental job duties of the position. 29 C.F.R. § 1630.2(p).

Accommodations under the Americans with Disabilities Act:

New questions that will arise in these cases

- **How would remote work affect the employee's ability to do his or her job?**

à *Laguerre v. Nat'l Grid USA* (2d Cir. 2022) – whether remote work is reasonable or creates undue burden is decision for fact-finder.

- **Are other employees permitted to work remotely?**

à *Knight v. MTA N.Y. City Transit Auth.* (E.D.N.Y. 2021) – Denial of remote work request when others are permitted to telecommute may be evidence of constructive discharge.

- **Has the job been handled remotely since 2020 successfully?**

à *See, e.g., Woodruff v. Peters*, 482 F.3d 521, 526-28 (D.C. Cir. 2007) - pre-pandemic case law suggests that, where employers have permitted remote work in the past (or when they benefited from it), they will need to explain a decision to withdraw or deny such arrangements going forward.

The key for employers will be to have clear policies and careful (and well-documented) decision-making processes in place.

— **Out of State Workers**

Remote / Hybrid Work

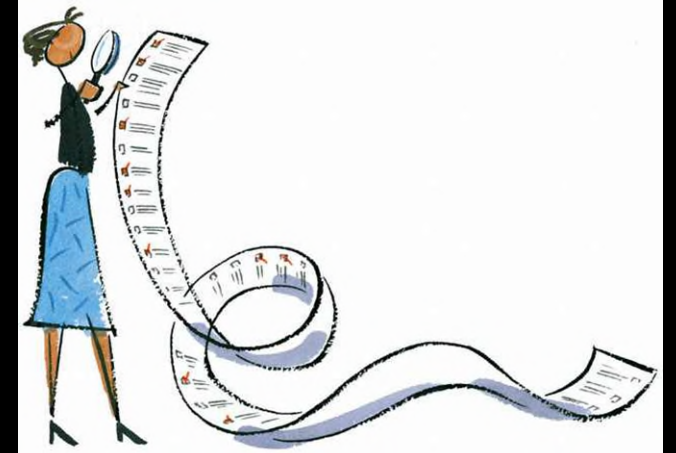
- The company is located in one state (“Home State”) – all of your policies and employee agreements are written for compliance with the laws of Home State.
- Now, you have employees spread across multiple states, working from their residence, vacation homes, boats, etc. (“Remote State”) – fully remotely or in hybrid situations with most of the work in Remote State.
- You don’t have any facilities in the Remote State.
- What laws apply to these employees – the laws of Home State or Remote State?

Legal Considerations

- Remote State laws may apply to your employee living and working there.
 - They also may trigger application of local laws, particularly when the employee is located in a major metropolitan area with its own employment-related ordinances.
- Coverage will depend on ...
 - Is the employer a covered entity – some state/local laws specify a minimum number of employees, but it often is unclear whether this means in the jurisdiction or across the employer's footprint; others are silent.
 - Is the employee a covered employee – some state/local laws establish thresholds for hours worked (in the jurisdiction?) to trigger coverage.
- States and cities tend to be protective of their citizens living and working in the jurisdiction.

Legal Considerations

- State and local laws that may be implicated:
 - Wage and Hour
 - Leave Entitlements
 - Equal Employment Opportunity
 - Restrictive Covenants and Other Agreements
 - Workers' Compensation
 - Tax Considerations
 - Other Issues: notice requirements, recordkeeping, I-9 verification



Wage and Hour

- Minimum wage
- Overtime: salary thresholds, daily overtime, exemptions
- Wage theft laws
- Pay frequency (and limits on direct deposit)
- Wage payment and collection laws – deductions from pay
- Meal periods, rest breaks, lactation breaks
- Fair scheduling laws
- Reimbursement for remote expenses



Leave Entitlements

- Paid sick leave (including public health emergency/COVID leave)
- Paid or unpaid family and medical leave
- Temporary disability and/or family leave insurance programs
- Domestic violence, sexual assault, stalking, harassment leave
- Military leave and family military leave
- School activities leave
- Various forms of civic duty leave – voting, election official, emergency personnel, court appearance, jury duty, victim and witness leave
- Various forms of donation leave – blood, bone marrow, organs



Equal Employment Opportunity

- Protected Classifications: The scope of protected classifications may differ depending on the state and local jurisdiction.
- Harassment Training Requirements: Some states and locales have adopted workplace harassment training requirements.
- Pregnancy and Related Conditions: Some states have enacted expanded rights related to accommodation.
- Fair Employment Practice Agencies:
 - You may get a charge of discrimination filed with a state or local agency in the employee's Remote State.
 - Or you may get sued in the Remote State without a charge, if the state allows lawsuits without exhausting administrative remedies.





Restrictive Covenants and Other Agreements

- States are increasingly restrictive when it comes to enforcing non-compete and non-solicitation agreements.
- Legislation now restricts enforcement in some states and imposes requirements (such as salary thresholds) in others.
- Will your agreement be enforceable under the law of the Remote State? Can you get around the issue with a “choice of law” provision selecting another state (e.g., Home State)?
 - Many states will enforce choice of law provisions only if the law of the selected state is not contrary to public policy of the state where work is performed (Remote State).
 - Where the Remote State is more protective, a court may not honor the choice of another state’s law.

Workers' Compensation

- Employers are required to provide workers' compensation coverage under most state laws – it can be insured or self-insured.
- Is coverage through the employer's Home State sufficient to cover remote workers? It depends on the reciprocity rules of the Remote State.
 - Some states only accept reciprocity for employees who are temporarily or intermittently working in the Remote State.
 - Some states recognize reciprocity with conditions, such as whether the employees are permanently working there.
 - Other states do not recognize reciprocity – the employer must have coverage under the Remote State's system.



**Workers
Compensation**



Tax Considerations

- General Rule: Employees are subject to income taxes in the state where work is performed
- This means employers are subject to withholding obligations in the Remote State, even without a place of business in that jurisdiction, subject to certain exceptions:
 - De Minimis Rule: If presence in Remote State is minimal (e.g., only a few days).
 - Reciprocity Agreements: Some states have agreements that allow employer to withhold based only on the state of residency.
- Convenience of Employer Doctrine: Employees may be deemed to be performing services from the employer's location (Home State), unless they are working remotely for the convenience of the employer (as compared to the employee's convenience).
- If required to withhold income taxes, business must register as employer in the Remote State.

Practical Advice



- **Wage & Hour:** Compare your Home State practices and policies with potentially applicable Remote State laws – remember that some, like minimum wage and salary exemption thresholds, may change annually.
- **Handbooks:** Consider adopting addenda for your handbooks to address Remote State jurisdictions, including leave entitlements.
- **Agreements:** Evaluate your employee agreements under Remote State laws -- restrictive covenants and arbitration programs. Will your Home State choice of law provision be upheld?
- **Workers' Compensation:** Discuss reciprocity with your insurance broker/carrier or the administrator of your self-insured program.
- **Tax Registration:** Register as an employer in those states where income tax must be withheld.

Hiring/Retention Challenges

Context

- One survey found that more than 90% of business leaders said their organization would not meet goals without the right talent. Leaders cited hiring or retaining talent as the biggest HR challenge in 2022.*
- Another found that the struggle to find enough people to hire has risen to the forefront as the top concern. Almost half (48%) of the respondents said that's the most significant risk to their business achieving its growth targets.**

*Source: iCIMS Workforce Report, <https://www.icims.com/2022-workforce-report/>.

**Source: PwC Pulse Survey: Executive views on business in 2022, <https://www.pwc.com/us/en/library/pulse-survey/executive-views-2022.html#:~:text=The%20struggle%20to%20find%20enough,it%20was%20before%20the%20pandemic.>

2022 Recruiting Challenges At a Glance

- **Labor/Talent Shortage**

- Employers are competing for a smaller pool of candidates.

- **More Passive Candidates**

- According to one survey, 70% of the global workforce comprises passive candidates, meaning they are not actively looking for a job but would consider a new opportunity if it were presented to them.*

- **Increased Competition**

- **Can you think of any more? ...**

- Not enough hours in a day!

Strategies To Hire And Retain

- Offering Bonuses!
 1. Sign on bonus
 - Pros: Attract potential hires; draw attention away from a lower base salary
 - Cons: Company may appear desperate; trigger resentment among current employees
 2. Referral bonus
 - Pros: Lifts morale of current employees; increases chances of a quality candidate
 - Cons: May not be necessary
 3. Retention bonus
 - Pros: Help retain employees during critical stages; may lead to greater recruitment interests
 - Cons: May be interpreted as sign of business change/collapse



Impact of Bonuses on Regular Rate of Pay (FLSA)

- Sign on bonuses
 - A signing bonus with a claw-back provision only vests once an employee meets a certain tenure; therefore, it becomes non-discretionary.
- Referral bonuses
 - Excludable for employees not primarily engaged in recruiting activities.
- Retention and other bonuses
 - Bonuses that employers announce to employees to induce them to work more steadily, rapidly, or efficiently or to remain with the company are also included in the regular rate of pay.

Bonus Clawbacks and Forfeitures

- An employer may not be able to withhold the bonus or make deductions once an employee earns it
 - Will depend on state law
 - In some jurisdictions, a non-discretionary bonus is considered a “wage”
- Wage deduction laws
 - NJ and PA restrict employers’ ability to make deductions from employee’s wages except in very specific circumstances such as to correct payroll errors, or for employer provided loans. N.J. Stat. Ann. § 34:11-4.4; 43 Pa. Stat. Ann. § 260.3

Strategies To Hire And Retain Cont.



- Relaxing Hiring/Background Check Criteria
 - One source reports a **small percentage** of employers (around **16%** of respondents) relaxing or eliminating background screenings, pre-employment drug testing, and educational requirements.*
 - Pros: Widen the recruiting pool; create more equitable hiring process; impact company culture
 - Cons: May risk company culture; increased risks of negligent hiring
 - **General Rule:** Select screenings best suited to industry and requirements, and proportional to the duties of the job
 - Example: if hiring for a position that will require a great number of responsibilities, and which, if poorly executed may endanger the physical safety of others, then take advantage of criminal, drug, and social media screenings.

EEOC Issues Involving Background Checks

- **Disparate treatment:** It's illegal to check the background of applicants and employees when that decision is **based on** a person's race, national origin, color, sex, religion, disability, genetic information (including family medical history), or age (40 or older).
- Apply the **same standards** to everyone, regardless of protected trait.
 - For example, if you don't reject applicants of one race with certain criminal records, you can't reject applicants of other races because they have the same or similar criminal records.
- **Disparate impact:** Take special care when basing employment decisions on background problems that may be **more common** among people of a certain protected trait (e.g., race or sex). Is the factor job related and consistent with business necessity?
- **ADA:** Be prepared to make exceptions for problems revealed during a background check that were caused by a disability.

Strategies To Hire And Retain Cont.

- Diverse slates
 - A **talent acquisition strategy** that starts with a **diverse pool of qualified candidates**, and the requirement to intentionally search for and interview talent from diverse backgrounds, identities, or experiences.
- Neither federal, state, or local law requires a diverse slate policy for private sector employers.
- Your organization may already have a diverse slate policy in place.
- **Because of their voluntary nature, employers enjoy freedom in how they craft their diverse slate policy.**



Questions?

Thank you for listening.