Current HR Topics Employers Should be Thinking About

October 2022

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TOPICS INCLUDE:

- Non-compete agreements
- Employee retention
- Wage and hour self-audits
- The Family Medical Leave Act (FMLA) and remote work
- Recommended employee handbook updates for 2023
- Quiet quitting

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Non-Competition Agreements

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Non-Competition Agreements

The employee non-competition agreement landscape continues to evolve rapidly, with several states enacting new limits on the use of non-competition agreements between employers and employees. Once a valuable tool for employers to protect their businesses from unfair competition, loss of customers, or misuse of company confidential information, many states have increasingly limited the enforceability of such agreements.

Non-Competition Agreements

The federal government is now weighing in on the appropriate use of non-competition agreements between employers and employees. President Biden's July 9, 2021 Executive Order asks the Federal Trade Commission ("FTC") to limit such agreements—signaling a potential expansion of federal regulation of agreements between employers and workers. And a pending Senate bill would ban most non-competition agreements. Given these developments, government contractors and other employers should assess whether their use of these agreements with employees is consistent with recent state developments and aligned with the broader trend toward limiting the enforceability of these agreements.

The State Judicial and Legislative Treatment of Non-Competition Agreements

Typically found in employment or separation agreements, non-competition agreements between employers and employees prohibit the employee from performing work that competes with their employer's business. This prohibition typically begins upon employment and lasts for a specified period of time after the employee no longer works for the employer. Non-competition provisions generally describe the duration of the non-compete period, the geographic limitation of the non-compete, and the types of work that the employee may not perform during the non-compete period.

The State Judicial and Legislative Treatment of Non-Competition Agreements

Traditionally, the enforceability of these agreements has largely been a matter of common law and subject to state contract law principles, though a few states, most notably California, long ago enacted statutes to limit enforceability to very narrow circumstances. In the vast majority of states, courts have tended to evaluate restrictions using flexible, multi-factor tests and, in some jurisdictions, courts may exercise their discretion to partially enforce or even rewrite overbroad non-competes (known as "blue-penciling"). However, the past few years saw an increasing number of states implement more bright-line statutory rules that specifically limit non-competes.

The State Judicial and Legislative Treatment of Non-Competition Agreements

This trend has continued. In May 2021, Oregon amended its non-compete statute to expressly provide that overbroad non-competes are void and unenforceable, which may limit a court's ability to enforce a narrower version of that non-compete. Also in May 2021, Nevada amended its laws to provide penalties for employers that attempt to enforce non-competition agreements prohibited by law (requiring courts to award attorneys' fees and costs where an employer improperly attempts to (i) enforce a covenant not to compete against an hourly wage employee or (ii) restrict employees from dealing with former customers whom the employee did not solicit).

The State Judicial and Legislative Treatment of Non-Competition Agreements

Many states have recently banned non-competes for low-wage or hourly workers. Virginia banned most covenants not to compete for low-wage employees, less than two years after Maryland had done the same. Nevada followed suit by prohibiting non-competition agreements for employees who are paid solely on an hourly wage, effective October 1, 2021. Some states have enacted even broader restrictions on non-competition agreements. Late last year, the District of Columbia joined California, North Dakota, and Oklahoma as the only states that ban the use of employer/employee non-competition agreements in most circumstances.

The State Judicial and Legislative Treatment of Non-Competition Agreements

As the patchwork of restrictions on covenants not to compete continues to grow, employers will need to keep track of the relevant state laws as well as potential federal laws and regulations that may be on the horizon.

Federal Efforts to Limit Employee Non-Competition Agreements

On July 9, 2021, President Biden signed the Executive Order on Promoting Competition in the American Economy ("Order"). The Order covers a number of competition issues. Most relevant to employer/employee non-competition agreements, the Order encourages the FTC to use its statutory rulemaking authority "to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility."

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Federal Efforts to Limit Employee Non-Competition Agreements

Separate from the Order, four U.S. Senators recently introduced the Workforce Mobility Act of 2021 ("WMA") with bipartisan support. If it becomes law, the WMA would (1) largely limit the use of non-competes to agreements signed as part of a sale of a business or a partnership dissolution or disassociation, (2) give the FTC and U.S. Department of Labor dual enforcement authority, and (3) give workers a private right of action to sue for violations of the WMA.

Federal Efforts to Limit Employee Non-Competition Agreements

These recent developments indicate that the federal government will restrict the use of employer/employee non-competition agreements. While a universal ban seems unlikely, the federal government may follow the state trend and prohibit non-competition agreements with low-wage employees or employees who have no access to the employer's trade secrets. Contractors and other employers whose employees have access only to customer relationships and confidential (but not trade secret) information may be particularly impacted by such restrictions.

Federal Efforts to Limit Employee Non-Competition Agreements

Legislative or regulatory limits on the enforceability of existing non-competition agreements with employees also may have adverse tax consequences for some employees. For example, taxation of restricted stock is sometimes delayed after an employee leaves when the restricted stock is subject to a non-competition requirement. Additionally, the excise tax for golden parachute payments is sometimes reduced or eliminated when a non-competition agreement is imposed following a termination of employment in connection with a corporate transaction. Banning the enforcement of these existing non-competition agreements could result in accelerating taxes or increasing excise taxes for some employees.

Practical Guidance for Government Contractors and Other Employers

In addition to monitoring state and federal developments regarding employee non-competition agreements, employers should bear in mind the existing enforcement parameters. As a general matter, non-competition provisions must be no broader than necessary to protect the employer's legitimate business interests. Employers should not assume that a court will blue-pencil overbroad provisions and enforce them in part, because a court may not have the power to do so or may simply decline to enforce an overbroad non-compete.

Practical Guidance for Government Contractors and Other Employers

To increase the likelihood that a non-competition provision is enforceable as written, the agreement should be narrowly tailored with respect to duration and geography as well as the type of competitive activities prohibited. For example, a provision prohibiting work in any capacity for a competitor may be subject to attack.

Practical Guidance for Government Contractors and Other Employers

An employee non-competition provision should clearly state that its purpose is to protect an employer's trade secrets and other confidential business information from being improperly used or disclosed. Companies employing low-wage workers should exercise additional caution in drafting covenants not to compete and consider the extent to which such covenants are necessary, if at all.

Practical Guidance for Government Contractors and Other Employers

Even with significant restrictions on the use of these agreements, employers can still protect their assets in other ways. For example, narrow customer non-solicitation agreements may be enforceable where broader non-competition agreements are not, and employee non-disclosure agreements are generally enforceable if appropriately tailored. Aside from contractual restrictions on competition or solicitation, employers should maximize protection of their trade secrets and other confidential information through practical safeguards such as enhanced data security protection measures, employee training on how to protect company information, and consistent enforcement of security and confidentiality policies.

5 Things You Need to Know about Non-Compete Agreements

Whether you call it a non-compete agreement or a covenant not to compete, there is no denying there is a lot of confusion out there regarding this particular type of contract.

What are they? What do they mean for employers and employees? And are they even enforceable?

So, before you enter into a non-compete agreement — either as an employer or employee — there are several things you need to know.

5 Things You Need to Know about Non-Compete Agreements

1. What, exactly, are non-compete agreements?

Non-compete agreements are contracts between an employer and an employee that are typically signed at the start of their business relationship. Essentially, a non-compete agreement prohibits the employee from competing with the business directly or indirectly for a specific duration of time after their employment has ended.

5 Things You Need to Know about Non-Compete Agreements

While the contents of the non-complete may vary from company to company, they may attempt to prohibit the employee from things such as:

- Working for a competitor company or competing individual
- Starting a company that offers the same products or services
- Developing competing products or providing competing services
- Recruiting former colleagues to join their new business, although this can also be done through a non-solicitation agreement

5 Things You Need to Know about Non-Compete Agreements

However, just because an employer may want to prevent an employee from competing against them, it isn't always that easy. In fact, there are very specific rules regarding the enforceability of non-compete agreements, which can vary from location to location.

5 Things You Need to Know about Non-Compete Agreements

2. When are non-compete agreements enforceable?

Almost every state has a slightly different approach when it comes to the enforceability of non-compete agreements. In fact, some states view non-competes as overly restrictive on competition — meaning they are only enforceable in certain circumstances or not at all.

However, in states where non-compete agreements are allowed, there are several factors courts often look to when determining if a specific non-compete is enforceable, including:

5 Things You Need to Know about Non-Compete Agreements

- Is the non-compete agreement needed to protect an employer's legitimate businesses interest, such as confidential business information?
- Does the non-compete agreement have a reasonable time limitation?
- Is the non-compete agreement limited to a specific geographic location (city, county, region, etc.)?
- Is the non-compete agreement support by "consideration," which means the employee receives some benefit — like a new job, more compensation, or stock options — for agreeing not to work for a competitor?

5 Things You Need to Know about Non-Compete Agreements

One thing to remember, though, is that just because you may happen to live in a state that permits non-compete agreements doesn't mean that every non-compete will be enforceable. Indeed, not meeting any of the factors above may be enough to invalidate a non-compete agreement even in states the generally enforce them.

5 Things You Need to Know about Non-Compete Agreements

3. What types of business interests can a non-compete protect?

One of the most important factors courts will often look at when determining the validity of a non-compete agreement is whether it actually protects a legitimate business interest of the employer.

If it doesn't, there really isn't any reason to stop the employee from competing against a former employer.

5 Things You Need to Know about Non-Compete Agreements

Some common legitimate business interests include, but are not limited to:

- Trade secrets
- Confidential business or professional information
- Company relationships with specific customers and clients, either existing or prospective
- Specialized training

5 Things You Need to Know about Non-Compete Agreements

4. What is considered a reasonable geographical area and time limit?

As mentioned above, a valid non-compete agreement should include a geographical area limitation. This simply means that a former employee cannot compete with the employer within that specific location. For example, some non-compete agreements will define the geographic restriction by a radius around the company's headquarters. Others may limit the non-compete agreement to specific cities in which the employer does business.

5 Things You Need to Know about Non-Compete Agreements

5. How Does President Biden's Order on Promoting Competition affect non-competes?

According to the *Executive Order on Promoting Competition in the American Economy*, President Biden has requested that the Federal Trade Commission set limits on the use of non-compete clauses:

"To address agreements that may unduly limit workers' ability to change jobs, the Chair of the FTC is encouraged to consider working with the rest of the Commission to exercise the FTC's statutory rulemaking authority under the Federal Trade Commission Act to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility."

5 Things You Need to Know about Non-Compete Agreements

As a general rule, the broader the geographical area, the less likely the non-compete is enforceable. For instance, an employer will have a much stronger argument if a non-compete is limited to a single city versus an entire state. That doesn't mean the latter isn't possible to enforce under certain circumstances, but it's going to be a lot harder for the employer to justify.

5 Things You Need to Know about Non-Compete Agreements

As for a time limit on a non-compete agreement, most employers see between six months and two years as a reasonable non-compete time frame, with one year being quite common. However, the time frame depends on the industry and type of career path the individual has. But the longer the duration of the non-compete period, the more likely a court will deem it unenforceable.

Employee Retention

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Employee Retention

- Managing for employee retention involves strategic actions to keep employees motivated and focused so they elect to remain employed and fully productive for the benefit of the organization.
- A comprehensive employee retention program can play a vital role in both attracting and retaining key employees, as well as in reducing turnover and its related costs.
- All of these contribute to an organization's productivity and overall business performance.
- It is more efficient to retain a quality employee than to recruit, train and orient a replacement employee of the same quality.

Employee Retention

Fairness and transparency are fundamental yet powerful concepts that can make a lasting impression on employees. According to SHRM's *Employee Job Satisfaction and Engagement: The Doors of Opportunity are Open* research report, employees identified these five factors as the leading contributors to job satisfaction:

1. Respectful treatment of all employees at all levels.
2. Compensation/pay.
3. Trust between employees and senior management.
4. Job security.
5. Opportunities to use their skills and abilities at work.

Employee Retention

Key reasons a focus on reducing turnover makes sense:

- Turnover is costly.
- Unwanted turnover affects the performance of an organization.
- As the availability of skilled employees continues to decrease, it may become increasingly difficult to retain sought after employees.

Turnover costs can have a significant negative impact on a company's performance; however, not all turnover is harmful. For example, a new replacement hire may turn out to be more productive or more skilled than his or her predecessor.

Employee Retention – Why Employees Leave

Voluntary Turnover

- A different job,
- Go back to school,
- Follow a spouse who has been transferred to a different location,
- Retire,
- Get angry about a work-related or personal issue,
- No longer need a job

Involuntary Turnover

- Lay-off
- Reduction in Force
- Termination

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Employee Retention – Why Employees Leave

Stay = Pay + Working Conditions + Opportunities >/= Time + Effort

- Generally, an individual will stay with an organization if the pay, working conditions, developmental opportunities, etc., are equal to or greater than the contributions (e.g., time and effort) required of the employee.
- These judgments are affected by both the individual's desire to leave the organization and the ease with which he or she could depart.

Employee Retention – Why Employees Leave

Studies have shown that employees typically follow four primary paths to turnover, each of which has different implications for an organization:

- **Employee dissatisfaction**. Attack this issue with traditional retention strategies such as monitoring workplace attitudes and addressing the drivers of turnover.
- **Better alternatives**. Retain employees by ensuring that the organization is competitive in terms of rewards, developmental opportunities and the quality of the work environment. Be prepared to deal with external offers for valued employees.

Employee Retention – Why Employees Leave

- **A planned change**. Some employees may have a predetermined plan to quit (e.g., if their spouse becomes pregnant, if they get a job advancement opportunity, if they are accepted into a degree program). However, increasing rewards tied to tenure or in response to employee needs may alter the plans of some employees. For example, if a company is seeing exits based on family-related plans, more generous parental leave and family-friendly policies may help reduce the impact.

Employee Retention – Why Employees Leave

- **A negative experience**. Employees sometimes leave on impulse, without any plan for the future. Generally, this is the result of a negative response to a specific action (e.g., being passed over for a promotion or experiencing difficulties with a supervisor). Analyze the types and frequencies of work-related issues that are driving employees to leave. Provide training to minimize prevalent negative interactions (e.g., harassment, bullying, or unfair and inconsistent treatment) and provide support mechanisms to deal with those problems (e.g., conflict resolution procedures, alternative work schedules or employee assistance programs).

Employee Retention – Why Employees Leave

Additional predictors of turnover that merit careful attention include:

- Organizational commitment and job satisfaction.
- Quality of the employee-supervisor relationship.
- Role clarity.
- Job design.
- Workgroup cohesion.

Employee Retention – Why Employees Stay

As important as it is to understand the reasons that drive employees to leave an organization, it is just as important to understand why valuable employees stay.

Studies have suggested that employees become embedded in their jobs and their communities and as they participate in their professional and community life, they develop a web of connections and relationships, both on and off the job. Leaving a job would require severing or rearranging these social and value networks.

Thus, the more embedded employees are in an organization, the more likely they are to stay.

Employee Retention – Why Employees Stay

Companies can increase employee engagement by:

- providing mentors,
- designing team-based projects,
- fostering team cohesiveness,
- encouraging employee referrals, and
- providing clear socialization and communication about the company's values and culture, as well as
- offering financial incentives based on tenure or unique incentives that may not be common elsewhere.

Employee Retention – Why Employees Stay

Employers must be responsive to the wants of employees. Prior to the COVID-19 pandemic, research found that nearly a third of workers sought out a new job because their current workplace didn't offer flexible work opportunities.

After 2020, many workplaces have remote work and flexible scheduling options that have been put to the test.

Employers can use this new flexibility to their advantage.

Employee Retention – Why Employees Stay

Employees want to be recognized for their achievements.

Respondents to the SHRM/Globoforce survey, *Using Recognition and Other Workplace Efforts to Engage Employees*, agreed that recognition can help create a positive workplace culture and employee experience, and 68 percent said their organization's recognition program positively affects retention.

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Employee Retention – Why Employees Stay

Employees who have the opportunity to move around within a company, whether to new jobs in different departments or by promotions, are more likely to stay with that company.

Employee benefits also play a role in retention. Offering a competitive benefits package, in addition to competitive pay, reduces the likelihood an employee will find the grass greener elsewhere.

Employee Retention – Effective Practices

Effective practices in a number of areas can be especially powerful in enabling an organization to achieve its retention goals. These areas include:

- **Recruitment**. Recruitment practices can strongly influence turnover, and considerable research shows that presenting applicants with a realistic job preview during the recruitment process has a positive effect on retention of those new hires.

Employee Retention – Effective Practices

- **Socialization**. Turnover is often high among new employees. Socialization practices—delivered via a strategic onboarding and assimilation program—can help new hires become embedded in the company and thus more likely to stay. These practices include shared and individualized learning experiences, formal and informal activities that help people get to know one another, and the assignment of more-seasoned employees as role models for new hires.
- **Training and development**. If employees are not given opportunities to continually update their skills, they are more inclined to leave.

Employee Retention – Effective Practices

- **Compensation and rewards**. Pay levels and satisfaction are only modest predictors of an employee's decision to leave the organization; however, a company has three possible strategies:
    1. Lead the market with respect to compensation and rewards.
    2. Tailor rewards to individual needs in a person-based pay structure.
    3. Explicitly link rewards to retention (e.g., tie vacation hours to seniority, offer retention bonuses or stock options to longer-term employees, or link defined benefit plan payouts to years of service).

Employee Retention – Effective Practices

- **Supervision**. Several studies have suggested that fair treatment by a supervisor is the most important determinant of retention. This would lead a company to focus on supervisory and management development and communication skill-building.

- **Employee engagement**. Engaged employees are satisfied with their jobs, enjoy their work and the organization, believe that their job is important, take pride in their company, and believe that their employer values their contributions. One study found that highly engaged employees were five times less likely to quit than employees who were not engaged.

Employee Retention – Broad-Based Strategies

Broad-based strategies are directed at the entire organization or at large subsystems and are intended to address overall retention rates. Examples include providing across-the-board market-based salary increases, changing the hiring process to incorporate retention-related criteria and improving the work environment.

Employee Retention – Broad-Based Strategies

The data needed to help a company determine which broad-based strategies to implement typically come from three places:

- **Retention research** can shed valuable light on the primary drivers of turnover. Attendance at conferences and membership in professional associations such as SHRM can provide access to the latest research on turnover and retention.
- **Effective practices** encompass the strategies that other organizations are using and are finding effective or ineffective.
- **Benchmarking surveys** can provide information about how a company compares to competitors on issues such as pay, benefits, bonus plans and the like.

Employee Retention – Targeted Strategies

Targeted strategies are based on data from several key sources, including

- organizational exit interviews,
- post-exit interviews,
- stay interviews,
- employee focus groups,
- predictive turnover studies and
- other qualitative studies.

This information can lead an organization to determine more specifically where a problem exists and to develop highly relevant and linked strategies to address the issue.

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Employee Retention – Implementation Groundwork

The following steps taken together can yield the information that an organization needs to determine the extent of its problem and to help shape the retention strategies that are implemented in response.

- **Determine whether turnover is a problem**. This step can be accomplished through turnover analysis, benchmarking and a needs assessment (both external and internal).

Employee Retention – Implementation Groundwork

- **Establish a plan of action**. After reviewing the turnover analysis, benchmarking data and needs assessment, create a plan to improve retention. Identify broad-based or targeted strategies (or a combination) for implementation.
- **Implement a retention plan**. Execute the strategies that have been identified as appropriate for the specific problem.
- **Evaluate the results**. After implementing the plan, evaluate the results to assess the impact relative to the cost.

Employee Retention – Benchmarking

Establishing appropriate benchmarks—both external and internal—is a key first step in preparing to implement an employee retention strategy.

- **External benchmarking**. Is a 15 percent annual turnover rate too high? This question is impossible to answer in isolation. Benchmarking and a needs assessment can provide valuable information for determining whether turnover is a problem for an organization. Through external benchmarking, a company compares its turnover rates against industry and competitor rates. These data represent annual and monthly quit rates as a percentage of total employment for all non-farm employment across the United States, broken down by industry, geographic location, sector, etc.

Employee Retention – Benchmarking

- **Internal benchmarking**. With this form of benchmarking, an organization tracks its turnover rate across time. If the rate increases, overall or among particular groups, this can be a red flag that a problem may exist.

Employee Retention – Common Problems

As with all strategic initiatives, there are some common problems associated with employee retention programs. These include:

- **Lack of top management support**. If senior management does not send a message to managers and supervisors emphasizing that employees are critical to the company's long-term success, supervisory employees are unlikely to focus on people-related issues. Unless senior management actively participates in the retention process and takes primary responsibility for it, managers and employees will remain unsure of the true value of employees, both to senior management and to the organization.

Employee Retention – Common Problems

- **Perception of the program as time-consuming "busywork."** Similarly, without an organizational commitment to the initiative and a clear understanding of how it is strategically contributing to the organization's successful long-term performance, managers may view a focus on people as, at best, "nice" or "just busywork" and, at worst, a huge waste of time that takes them away from the more important demands of their "real job."

Employee Retention – Costs and Return on Investment

Because there are so many different actions a company can take to improve its employee retention rate, it is not feasible to quantify the "typical" costs—hard and soft—of designing and implementing a program. However, an organization should still try to budget its own initiative carefully.

The payback in financial terms can be estimated by reviewing a number of metrics, including turnover data, promotions/transfers from within versus outside recruiting, number of grievances filed, absenteeism, discrimination complaints, etc.

Employee Retention – Auditing and Evaluating

Any initiative or program—especially one designed to retain an organization's key talent—needs to be continuously evaluated to determine if it is effective and to identify opportunities for improving it. An effective way to determine whether the employee retention program is working is to conduct an independent audit of the way the program is affecting various groups of employees.

For example, are certain types of employees (e.g., low-skilled, highly skilled, technical, professional, managerial, executive or those with varying degrees of tenure) leaving the organization at more significant levels than others? If so, that group can be targeted for specific interventions.

Employee Retention – Auditing and Evaluating

One way to audit retention initiatives in addition to continuing to review turnover rates and exit interview results is to conduct stay interviews of current employees. Stay interviews help employers ascertain why good employees stay and what might make them leave. It is highly recommended that managers themselves conduct these meetings, after proper training, as they have the most direct relationships with employees.

Employee Retention – Global Approaches and Perspectives

In an increasingly globalized economy, retention of quality employees is a global issue.

Increases in cultural differences within the workforce raise critical issues for employers. Employee retention efforts have proved very difficult to implement in some parts of the world due to differing expectations for pay, work assignments, benefits and the like. If a company is global in scope or simply has a highly diverse employee population, both cultural and national differences must be taken into account at the outset of the development of any new HR-related program, including employee retention strategies.

Conducting Wage And Hour Checkups

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Conducting Wage And Hour Checkups

We visit the doctor and the optometrist once a year and our dentists at least twice a year. Why? We attend the appointments not because they're necessarily fun but because they're vital for maintaining good health and wellness. They provide assurance that if things aren't so good, we have the chance to correct course. All too often, however, our businesses don't undergo similar compliance checkups, especially in the wage and hour field, where audits are vitally needed.

Conducting Wage And Hour Checkups

Recent media stories about the U.S. Department of Labor (USDOL) investigations into LaBelle Winery and Dos Amigos are uncomfortably prescient. Going through a USDOL or a New Hampshire Department of Labor (NHDOL) investigation isn't enjoyable, but it's worse when hefty penalties and back wages lurk on the other side. Federal lawsuits filed by employees over the failure to pay wages are often worse given the litigation's adversarial nature and the threat of liquidated damages and the payment of mandatory attorneys' fees. Class actions are in a class of their own.

Conducting Wage And Hour Checkups

Many wage and hour violations can be identified and cured with periodic compliance monitoring. Trust when I say that correcting a violation in advance is far healthier for your bottom line than defending an unlawful practice in court. Wage cases often aren't a question of win or lose but rather of how much.

Conducting Wage And Hour Checkups

Not convinced yet? The Fair Labor Standards Act (FLSA) imposes liquidated damages for wage and hour violations. "Liquidated damages" are a penalty equal to the back wages owed to an employee. One way to avoid them is to convince the court the error was in "good faith" and that the company reasonably believed it complied. Periodic checkups will improve the viability of a good-faith defense (if one is needed at all). Simply saying "I thought we were incompliance" won't be enough.

Conducting Wage And Hour Checkups

Wage and hour checkups should be a routine business practice.

Here are some tips on where and how to begin:

Conducting Wage And Hour Checkups

Get back to basics. If asked, could your business produce the time records, I-9 forms (with supporting documents), personnel files, payroll records, benefits records, and commission/on-target earnings records for all employees within a week or two of being asked? More important, are your business records accurate?

Inaccurate time records are an evergreen litigation source for plaintiffs' attorneys. Employees may clock in and out regularly but then perform off-the-clock work that isn't being compensated. Businesses are obligated to track all hours worked for nonexempt employees, and when they fail to do so, aggrieved employees need only estimate their hours for the payment of back wages and liquidated damages.

Conducting Wage And Hour Checkups

Focus on exemptions. Overtime exemptions are nuanced and occasionally inapposite to a modern economy. Some exemptions are obvious. The company CEO? She's likely exempt. But is the company bookkeeper really exercising the discretion and independent judgment needed to qualify for the administrative exemption? Probably not.

Overtime misclassifications are costly mistakes because unpaid hours add up quickly, and there often aren't records to determine the exact amount of time worked.

Conducting Wage And Hour Checkups

Monitor technology use. Time spent commuting generally isn't compensable. But if a nonexempt employee sends emails from home in the morning and then drives to the office, the time spent traveling may become covered.

Understand compensable time. Businesses are often surprised about what time is compensable. Travel time, on-call time, lunch breaks, trainings, and pre/postwork activities can all be compensable depending on the circumstances. Just because employees aren't in the office doesn't mean they're not working.

Conducting Wage And Hour Checkups

Ensure child labor law compliance. New Hampshire has strict child labor requirements, and every year, the violations are in the NHDOL's top 10 list of wage and hour infractions. Any company hiring minors should proceed cautiously. Carefully check to ensure the appropriate releases have been obtained and that a minor's hours don't exceed what the law prescribes.

Conducting Wage And Hour Checkups

Don't rely on industry custom. I hear it all the time: “No one in our industry pays their employees for that." My response is twofold: (1) How empirical is your data really, and (2) industry practice is irrelevant. If you're in a group of cars going 90 mph and you're the one who gets pulled over, guess who's getting the ticket.

Don't ignore industry-specific laws. At the same time, companies should be mindful that certain industries are governed by unique laws. The restaurant industry, for example, has specific requirements for employers using a tip credit and unyielding protocols around tip-pooling.

Conducting Wage And Hour Checkups

Don't rely on Internet searches. Google is a wonderful tool. Presentations like this one are useful tools as well. But when it comes to nuanced questions, there is no replacement for statutes, regulations, administrative decisions, and case law. Agencies like the USDOL base their decisions on those primary sources.

Get into the nitty-gritty of the primary sources, but don't go fishing in the dark either. Work with qualified professionals to understand and apply the law.

Conducting Wage And Hour Checkups

Work with qualified professionals. Every company should work with qualified compensation specialists who are facile with the primary sources mentioned above. The FLSA was enacted in 1938. Some of its provisions are arcane and many of its regulations confounding. For example, the Act doesn't even define what constitutes work. Knowing what "work" means and when it is compensable requires a comprehensive understanding of the law's structure and intent and the case law interpreting it.

To confound matters further, New Hampshire state law sometimes follows the FLSA, other times imposes standards different from the federal law, and occasionally is silent. Use professionals to unmuddy the waters.

Conducting Wage And Hour Checkups

Bottom Line. Every business has a hierarchy of needs, which may not include wage and hour monitoring, but don't wait until legal action is threatened to address ongoing violations. By then, it's often too late.

How does the FMLA Apply to a Remote Workforce?

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How Does The FMLA Apply to a Remote Workforce?

The Family and Medical Leave Act (FMLA) was enacted in 1993, a year when the idea of working a corporate job from a living room was rare. When the law was passed, the FMLA didn't contemplate a remote workforce. Now, and especially post-pandemic, many companies are embracing a fully remote workforce (e.g., sales representatives, healthcare medical device technicians and software engineers). While employees' needs for a leave of absence have always been around, remote employment and its effects on the applicability of the FMLA requirements has not.

How Does The FMLA Apply to a Remote Workforce?

For well over two years, many employees have been working from home. Some report to a manager at the headquarters or worksite. Plenty of remote employees, however, report to an individual who also works remotely. The new remote landscape is making what used to be an easy application of FMLA eligibility into a difficult analysis.

The FMLA Remote Employee Framework

The FMLA requires that certain private employers provide eligible employees with up to 12 weeks of unpaid leave from work to take care of their serious health condition or a family member's serious health condition. A private employer with more than 50 employees within a 75-mile radius of the employee's worksite must provide the requisite 12-week leave. An eligible employee is one who meets all of the following conditions:

- Is employed for at least 12 months
- Has been employed for at least 1,250 hours during the 12-month period immediately preceding the start of the leave
- Is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite.

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The FMLA Remote Employee Framework

One of the most challenging aspects of determining eligibility for leave under the FMLA is whether the employee is employed at a "covered employer" (i.e., a worksite with 50 or more employees within a 75-mile radius).

The FMLA is silent on its applicability to remote workers. However, the US Department of Labor's implementing regulations state that "[f]or employees with no fixed worksite, . . . the worksite is the site to which they are assigned as their home base, from which their work is assigned, or to which they report." Further, "[a]n employee's personal residence is not a worksite in the case of employees . . . who travel a sales territory and who generally leave to work and return from work to their personal residence, or employees who work at home, as under the concept of flexiplace or telecommuting."

A Case Study on FMLA's Applicability to Remote Employees

Recently, a Texas court analyzed the remote employee question and the applicability of the FMLA. In *Landgrave v. Fortec Medical Inc.*, a remote employee sued her former employer, Fortec, alleging that it failed to provide her leave under the FMLA after concluding that she was not eligible because the company did not have 50 employees within a 75-mile radius in Texas. Landgrave was employed as a surgical laser technician and was hired as a remote employee. Landgrave argued her "worksite" under the FMLA was the company's headquarters in Ohio, which did have more than 50 employees. Fortec argued that her "worksite" was in Texas.

A Case Study on FMLA's Applicability to Remote Employees

Although Landgrave was hired through Fortec's Ohio headquarters, she lived and primarily worked in Texas (sometimes her work required her to travel to other states, but not Ohio). Landgrave's supervisor also was a remote employee working from Texas. The supervisor managed the south-central region of Texas, oversaw logistics for the region, paired surgical technicians with assignments, monitored Landgrave's performance and handled Landgrave's requests for time off.

A Case Study on FMLA's Applicability to Remote Employees

The court denied Fortec's motion for summary judgment because it found that there was a genuine issue of fact as to Landgrave's worksite and therefore her FMLA eligibility. To have won summary judgment, Fortec would have had to establish that the Ohio headquarters worksite was not her home base, the site that assigned her work or the site to which she reported. A brief overview of each issue is below.

A Case Study on FMLA's Applicability to Remote Employees

- **Home Base**. The court found that there were insufficient facts to establish that the Ohio location was Landgrave's home base. Using the Worker Adjustment and Retraining Notification Act as a guide, the court stated that an employee's home base "must at a minimum be a location at which the employee is physically present at some point during a typical business trip" and "refers not to the physical base of the employer's operations . . . but rather to the physical base of the employee." Since Landgrave was never physically present in Ohio, she could not establish Ohio as her home base.

A Case Study on FMLA's Applicability to Remote Employees

- **Assignment of Work**. The court found that there was a genuine issue of fact regarding where the assignments were created/originated, and the dispute on this element precluded summary judgment. The assigning site is the "source of the day-to-day instructions" given to the employee. It is not determined by the location of payroll or other centralized managerial or personnel functions. It is not merely from where the instructions are passed, but rather "where the people were who were ultimately responsible for creating and receiving the assignment information." In Landgrave, the employee's supervisor assigned work from his home in Texas, and he directed cases to specific employees within the Texas region. However, Landgrave characterized her supervisor's assignment of work as "click[ing] the mouse on his computer at his house and send[ing] the[] instructions from [Ohio] to one technician or the other in his region." The court found that while Landgrave's supervisor appeared to have more of a role than a "mere conduit," his duties did appear ancillary to the actual assignment activity, which created a triable issue of fact for the jury as to whether that assignment came from headquarters in Ohio.

A Case Study on FMLA's Applicability to Remote Employees

- **Reporting Worksite**. The court also found there was a genuine issue of fact as to Landgrave's supervisor's reporting structure and authority, such that the issue also precluded summary judgment. The location to which an employee reports is determined based on the "location of the personnel who were primarily responsible for reviewing . . . reports and other information sent by the [employee], in order to record [tasks], assess employee performance, develop new sales strategies, and the like." It was undisputed that Landgrave's supervisor did not review reports from her. In fact, Landgrave sent reports only to Ohio and never sent anything to her supervisor. Fortec focused on the fact that her Texas supervisor assessed her employment and was empowered to discipline and evaluate her. However, the company's claim lacked factual support at the summary judgment stage, as there was no evidence that her supervisor did any evaluations or had the power to impact her employment status. For those reasons, Fortec's argument on this element was not strong enough to support summary judgment.

A Case Study on FMLA’s Applicability to Remote Employees

Since the court's ruling, the parties reached a confidential settlement concerning Landgrave's FMLA claims.

Practical Options for Employers With a Remote Workforce

Given the FMLA legal framework described above and the insight from the Landgrave decision, employers have three options to manage FMLA leave with a remote workforce.

1. **Conservative Approach**. Employers can take the most conservative approach by determining that the FMLA applies to remote employees (assuming the length of employment and hours worked conditions are met). Approaching eligibility from this perspective will help employers avoid potential violations of the FMLA and related legal claims. However, in some factual situations, this option may provide more generous leave than the employees are entitled to receive, and FMLA leave is often difficult for employers to manage.

Practical Options for Employers With a Remote Workforce

2. **Affirmative Approach**. Employers can undertake the FMLA analysis themselves by affirmatively assigning either a reporting site or an assignment site, and then ensuring that such worksite meets the requirement of 50 or more employees within 75 miles. This approach appears to be supported by the FMLA regulations, which state, "[f]or employees with no fixed worksite . . . the worksite is the site to which they are assigned as their home base, from which their work is assigned, or to which they report." Employers should note that the day-to-day facts may undermine an employer's express designation, however.

Practical Options for Employers With a Remote Workforce

2. **Affirmative Approach**. (cont.) For example, if an employer by policy and written agreement determines that all remote employees report to X location, but no employees ever actually report to X location, those facts may undermine the employer's designation of the reporting site. The same concept applies to an assignment site. If an employee never receives assignments, or receives only a small number of assignments, from Y worksite, a court may have trouble concluding that Y is indeed the accurate worksite on which to base the 75-mile radius test. Either way, as seen in Landgrave, courts have the discretion to use any of the three worksite bases outlined above for the 75-mile test.

Practical Options for Employers With a Remote Workforce

3. **The Landgrave Approach**. Employers can take a more liberal approach and analyze the FMLA application to the remote workforce on a case-by-case basis. This would involve examining each employee's home base, assigning site and reporting site, then determining whether any of those locations have 50 or more employees within a 75-mile radius. If they do not, the employee would not be eligible for FMLA leave. But as shown in Landgrave, this approach has a higher risk of litigation due to potential factual disputes about the sites at issue.

Practical Options for Employers With a Remote Workforce

In the wake of COVID-19, more businesses are permitting their employees to work remotely. When it comes to family and medical leave (paid or unpaid), employers should make sure they understand the eligibility rules for their remote employees under federal and (sometimes conflicting) state law. In the case of the FMLA, it is important for employers to understand the workflow of the business and to track the various worksites for all employees, including the remote ones.

2023 Employee Handbook Recommended Updates

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2023 Employee Handbook Recommended Updates

Let's be honest – no one gets excited about spending time or money working on their employee handbook. Many employers think that their ten-year-old handbook is fine, and they take the approach of "if it ain't broke, don't fix it." Right?

Wrong. I can almost promise you that something in your handbook is broken – and you just don't know it – yet.

2023 Employee Handbook Recommended Updates

Employment laws continue to change and evolve. Your organization continues to change and evolve. If you have not updated your handbook to meet those changes, then you may be in peril.

Having overhauled a dozen handbooks just since the pandemic began, here are my top 10 issues that I commonly see with employee handbooks that can become problems if not addressed:

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2023 Employee Handbook Recommended Updates

1. Does your handbook expressly prohibit discrimination based on sexual orientation and gender identity?

   It better following the Supreme Court's 2020 decision in Bostock v. Clayton County that brought sexual orientation and gender identity under the protections of Title VII.

2023 Employee Handbook Recommended Updates

2. Do you give light-duty accommodations for employees who suffer workplace injuries so they can still work?

   If so, then you may consider providing the same type of light-duty accommodations for pregnant employees, as well as expressly addressing pregnancy accommodation in your handbook.

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2023 Employee Handbook Recommended Updates

3. Do you pay employees for short-term absences related to things like jury duty and bereavement but not for short-term military service?

   If so, then you may be violating federal law.

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4. Does your handbook state that employees who do not return to work at the end of their 12 weeks of FMLA-protected medical leave (or after any arbitrary period of time) will be automatically terminated?

   I hope not, because federal law may require you to give the employee additional unpaid leave as a reasonable accommodation for a disability.

2023 Employee Handbook Recommended Updates

5. Can you prove that every single one of your employees received a copy of the employee handbook?

   If not, then you may have a hard time defending a sexual harassment lawsuit when the plaintiff says that he/she never received a copy of your harassment policy and/or procedure for reporting sexual harassment.

2023 Employee Handbook Recommended Updates

6. Do you have employees working remotely, or otherwise, outside of the state(s) where you typically conduct business?

   Then you better be sure that your policies and practices comply with the laws of those states, too, which may require policy addendums in some instances.

2023 Employee Handbook Recommended Updates

7. Does your handbook promise progressive discipline (e.g., three strikes and you're out) that you do not follow?

   This could be a breach of contract in some states or used against you as evidence of unlawful discrimination under some circumstances.

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2023 Employee Handbook Recommended Updates

8. Does your employee handbook prohibit employees from discussing their wages and other terms of their employment with other employees or third-parties?

   If so, then you may have already violated the National Labor Relations Act, which, by the way, applies to both unionized and non-unionized employers.

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2023 Employee Handbook Recommended Updates

9. Do you have a policy related to nursing mothers?

   Federal law and some state laws require employers to give a nursing mother a time and place to express breast milk.

2023 Employee Handbook Recommended Updates

10. Finally, has your handbook kept up with recent changes brought on by the Covid-19 pandemic?

    I think we can all agree that, for better or worse, the pandemic has changed how and where people work. Employers more frequently use policies for remote working, mandatory vaccinations, flexible paid time off, and other things that were not given much consideration only a few years ago. Some of those policies which have been adopted "on the fly" over the past months and years may need to be incorporated into your handbook.

2023 Employee Handbook Recommended Updates

Yes, I know – employee handbooks are not exciting. But an updated, accurate, and legally compliant handbook provides an important opportunity to communicate with employees and avoid misunderstandings and disputes, as well as protecting the organization if a dispute arises.

But having a legally deficient handbook can, in some instances, be worse than not having one at all. Governmental agencies are out in force, and employment lawsuits are on the rise. So, if your employee handbook predates the pandemic, then it's probably time for a checkup.

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Quiet Quitting

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Quiet Quitting

You've likely heard about the latest term to enter the workplace zeitgeist - "quiet quitting" - from any number of sources, including the New York Times and the Wall Street Journal. Advocates of "quiet quitting" are largely rebranding and advancing a rallying cry that has, of course, existed for much longer than the last few weeks: that workers should say "no" to additional work without additional pay, and/or not take on additional duties outside of workers' job descriptions. Many detractors view this concept as simply "phoning it in," noting that a lack of commitment will hurt workers' chances for advancement or impact their performance in their current roles. Regardless of one's feelings about this cultural moment (or its staying power in light of economic uncertainty), one must acknowledge the national conversation.

Quiet Quitting

Employers may feel distressed after reading such articles. Managers may picture remote workers twiddling their thumbs at home or emboldened workers doodling in their cubicles while on the clock.

But perceptive managers and executives should avoid viewing workers' concerns as nefarious. Instead, employers may want to take a moment to level-set with their employees to ensure mutually beneficial relationships.

Quiet Quitting

The "quiet quitting" concept is reportedly taking hold in large part because workers are trying to re-draw work-life boundaries following the pandemic, the Great Resignation, return-to-office pushes, inflation woes, and other recent phenomena. Many teams are stretched thin given labor market constraints, and remaining workers are taking on wider responsibilities. Employers should evaluate what is working, what is not, and how they can offer support to help combat worker fatigue. Some workers may be looking for a pay or title increase if they have taken on considerably more work during the pandemic. Others may be looking to set stricter boundaries between work and personal time given the blurring that occurred during the pandemic.

Quiet Quitting

For exhausted workers, managers may want to encourage use of accrued PTO or utilization of employer-provided counseling services via an Employee Assistance Program. Other solutions may include showing clearer pathways to advancement or setting clearer expectations around work responsibilities. Potential solutions abound, but the key for employers is to use this moment to engage with their workers and figure out what can be done to make the workplace a mutually beneficial environment.

Quiet Quitting

Over the last several weeks, the concept of "quiet quitting" has exploded like a supernova across the media universe.

The big bang began on TikTok, with a video uploaded by a 20-something engineer named Zaid Khan. With the sound of a piano playing a ragtime-style tune and summertime shots of New York City flashing across the screen, Khan narrates a 17-second video that has introduced millions of people to the idea.

Quiet Quitting

"I recently learned about this term called quiet quitting, where you're not outright quitting your job, but you're quitting the idea of going above and beyond," Khan says. "You're still performing your duties, but you're no longer subscribing to the hustle culture mentality that work has to be your life. The reality is it's not — and your worth as a person is not defined by your labor."

Quiet quitting, in other words, is not really about quitting. It's more like a philosophy for doing the bare minimum at your job.

Quiet Quitting

In Japan, there's a concept called *shokunin*, which refers to an artisan who is deeply dedicated to their craft, always striving for perfection in what they make. Quiet quitting is like the opposite of that. It's about divorcing your ego from what you do for a living and not striving for perfection. Setting boundaries and simply completing the tasks you're supposed to complete within the time that you're paid to do them — with no extra frills. No more kowtowing to your boss or customers. No more working nights and weekends, incessantly checking your email.

Workaholism is out. Coasting is in. Call it the work-life balance manifesto.

Tapping Into The Post-Pandemic Zeitgeist

With a super-tight labor market giving workers multiple job options, and an ongoing battle being fought over the preservation and expansion of remote work, many workers seem to be reevaluating where and how they do their jobs.

Maybe quiet quitting is just an extension of "The Great Resignation" (or, "The Great Renegotiation"). Maybe a large chunk of our labor force was always phoning it in, but now they have a loud social-media presence and better branding. Maybe it's people feeling like suckers for going the extra mile pre-pandemic just to get laid off en masse. Or maybe quiet quitting is a BS pseudo-trend. To be honest, we don't know. But there is at least some data to suggest there's something real going in the psyche of the workforce.

Tapping Into The Post-Pandemic Zeitgeist

"With layoffs and firings at a record low... people have unprecedented job security," says Julia Pollak, chief economist at the job-search website ZipRecruiter. "And so the risk of termination is lower. And that's also why the incentive to work harder is reduced. The consequences of being found to shirk have become much smaller. One, because companies can't afford to fire people. And two, because there are so many alternatives out there if you do lose your job.“

Tapping Into The Post-Pandemic Zeitgeist

Meanwhile, government data shows an historic drop in productivity over the last two quarters. There could be many reasons for this: the supply chain fiasco, a record rate of job switching, business hiring decisions during a weird time for the economy, scars from the pandemic, growing pains from the mass adoption of remote work, you name it. But some argue that something like quiet quitting might have something to do with it. It would certainly play into a sentiment expressed by some of America's biggest corporations: their employees just aren't being productive enough.

Tapping Into The Post-Pandemic Zeitgeist

Gallup recently did a survey about quiet quitting, counting workers who report being neither engaged nor "actively disengaged" at work. They found that these quiet quitters make up at least half of the U.S. workforce. Overall, Gallup's data doesn't really show a sizable shift in how workers feel about their jobs over the last few years, suggesting that quiet quitting could be a normal feature of the American workplace. One area where the data did show a somewhat significant change, however, was among younger workers. "The percentage of engaged employees under the age of 35 dropped by six percentage points from 2019 to 2022," Gallup finds, suggesting that while feeling meh about work may be par for the course for a lot of Americans, it may be gathering momentum among Gen Zers and millennials.

Tapping Into The Post-Pandemic Zeitgeist

"It's clear that quiet quitting is a symptom of poor management," Gallup writes. The organization recommends that company managers do a better job communicating with their underlings. "Gallup finds the best requirement and habit to develop for successful managers is having one meaningful conversation per week with each team member — 15-30 minutes."

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The Loud Reaction to Quiet Quitting

Since the concept of quiet quitting began ricocheting around the internet, there have been countless takes on it. Supporters argue that quiet quitting is a way to safeguard your mental health, prioritize your family, friends and passions, and avoid burnout. But many movers and shakers are against it.

"Quiet quitting isn't just about quitting on a job, it's a step toward quitting on life," complains Arianna Huffington, arguing quiet quitters would be better served finding jobs they are passionate about.

"People who shut down their laptop at 5... they don't work for me," says business thinkfluencer Kevin O'Leary in a CNBC video. "I hope they work for my competitors."

The Loud Reaction to Quiet Quitting

Others worry that quiet quitting is too passive aggressive, can't accomplish what workers really want, and puts an extra burden on coworkers. Kami Rieck, writing in The Washington Post, suggests "the people who tend to experience the highest levels of burnout — women and people of color — probably can't afford to 'quiet quit.'" Instead of silently refusing to put in extra effort, Rieck writes, "it would probably be more helpful to raise these concerns with your boss and brainstorm other solutions."

The Loud Reaction to Quiet Quitting

Hamilton Nolan, writing in The Guardian, stresses that workers in generations past also felt a "collective sense of malaise," but they channeled their frustrations into something more productive than coasting at their jobs: creating unions. "All of these working people did not quit. Nor were they quiet. They knew what was wrong, and they fixed it. Loudly."

Even U.S. Secretary of Labor Marty Walsh recently chimed in on quiet quitting: "If you are an employer, you should catch on early enough that your employees aren't satisfied, aren't happy, and then there needs to be a dialogue, a conversation."

The Economics of Quiet Quitting

One of the more simple models in neoclassical economics says that, in a competitive market, workers are paid their "marginal product." That means the more productive they are — the more extra widgets they make per hour — the more they get paid. In this cartoon world, there would be strong incentives against quiet quitting. You work harder, you get paid more: You coast, and you get paid less. And, we should say, for some workplaces, that may actually be a good approximation of how the world works. You're more likely to get raises and promotions when your boss believes you're working hard.

The Economics of Quiet Quitting

But, of course, the world is much more messy than workers simply getting paid for how efficiently they work. A more sophisticated cartoon of the workplace is known as "the principal-agent model." In this model, the principal (the boss) enlists an agent (the worker) to do a specific job for them. The problem: the principal doesn't have complete information on exactly what their agent is doing. Is their agent being productive on the job? Or are they slacking? In order to make sure the agent is doing their bidding, the principal must figure out ways to incentivize and monitor them. The model has implications for the dramatic changes in office life — or lack-of-office life — we've seen in recent years. With the mass adoption of remote work, many managers seem to be struggling with how to effectively monitor and motivate their employees.

The Economics of Quiet Quitting

But companies are trying. A recent investigation by the New York Times finds "eight of the 10 largest private U.S. employers track the productivity metrics of individual workers, many in real time." And they document a surge in companies investing in "digital productivity monitoring" to oversee their white-collar employees. "Many employees, whether working remotely or in person, are subject to trackers, scores, 'idle' buttons, or just quiet, constantly accumulating records. Pauses can lead to penalties, from lost pay to lost jobs." It's all a bit icky.

Workers Tell *NPR* What They Think

Of course, the mantra of quiet quitting, at least according to TikTok, is not really about failing to do your job. It's about "quitting the idea of going above and beyond." But the concept has drawn much criticism — for being a misnomer, for example. Or for overshadowing the "quiet firing" trend, where companies passively aggressively make their employees' work lives unhappy, and "quiet fleecing," which refers to workers' pay lagging behind their increased productivity for decades.

Workers Tell *NPR* What They Think

NPR reached out to listeners and readers to get their perspective on quiet quitting. Some dislike the name. It's pretty confusing. So they offered some rebranding alternatives:

- Reverse hustle
- Work-life integration
- Acting your wage
- Workforce disassociation
- Corporate coasting
- Working at work
- DYJ: Doing Your Job
- Working to rule
- Working to thrive
- Morale-adjusted productivity

Key Points

- Check-in with your employees, personally if possible
- Review job descriptions and actual job duties
- Reward employees that have been going above and beyond, especially if covering for staffing shortages
- Performance manage underperforming employees
- Keep the conversation going

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