



## 2023 International Client Seminar

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### If That's Movin' Up, Then I'm Movin' Out

*Ideas on How to Prevent Your Employees (and Your Management Team) from Having a Heart Attack (Ack, Ack, Ack, Ack, Ack!)*

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#### Pandemic Impact on Employee Mental Health

The COVID-19 pandemic, which emerged in December 2019, caused a global health crisis. By July 2022, the number of confirmed cases was over 561 million and the death toll exceeded six (6) million worldwide<sup>i</sup>.

Studies continue to show that large employers remain concerned about the COVID-19 pandemic's long-term impact on employee well-being, retention, and recruitment<sup>ii</sup>. Long lockdowns, supply shortages and supply-chain interruptions, and inflation have aggravated the effects of the pandemic. Employers anticipate an increase in the number of employees suffering from long-term mental health and substance use issues, as well as an increase in medical services, late-stage cancer diagnoses, and delayed consequences from a decrease in medical services during the pandemic.

#### *Post-Traumatic Stress Disorder*

Post-Traumatic Stress Disorder or "PTSD" is a psychological response to a traumatic event. There are four (4) categories of symptoms that characterize PTSD: (1) re-experiencing the trauma; (2) avoiding certain situations; (3) negative changes in emotions and beliefs; and (4) experiencing hyperarousal<sup>iii</sup>. As of March, 2022, more than half of America's public health workers reported at least one symptom of PTSD as a result of the COVID-19 pandemic, according to a survey of nearly 45,000 employees in state and local government public health departments. The study revealed high levels of stress, burnout, and intent to leave among public health employees, many of whom reported threats and harassment from officials and community members who opposed their guidance on pandemic mitigation efforts<sup>iv</sup>.

Outside of exposure for the public health workforce, some of the strongest predictors of development of PTSD after exposure to a trauma include previous trauma exposures (sometimes called "lifetime trauma load") and history of childhood trauma and adverse childhood events ("ACEs", e.g. childhood physical, sexual, and/or emotional abuse, physical and/or emotional neglect, witnessing violence toward one's mother, etc.). A combination of childhood and previous adult trauma exposure further increases PTSD risk in response to all forms of trauma<sup>v</sup>. And, according to Dr. Samantha Meltzer-Brody, a professor studying mood and anxiety disorders at the University of North Carolina at Chapel Hill, individuals at risk for PTSD who have contracted COVID-19 are at a heightened risk for depression and may have a difficult time coping with the trauma related to a quarantine or potential hospitalization<sup>vi</sup>.

Private enterprises may begin to follow the lead of governments, such as Canada, who are making significant investments into mental health support for trauma and PTSD. On June 27, 2022, Honourable Carolyn Bennett, Canada's Minister of Mental Health and Addictions and Associate Minister of Health, announced an investment of \$28.2 million for nine projects to address PTSD and trauma in frontline and essential workers and others whose mental health has been significantly impacted by the COVID-19 pandemic. The projects are designed to help to deliver and test interventions, develop resources for affected or at-risk populations, and create resources and guidance for service providers and organizations. The projects will reach frontline and essential workers including health care providers, public safety personnel and their families, personal support workers, and long-term care workers. The investment will also facilitate a Knowledge Development and Exchange Hub, which will use data from the referenced projects to help inform mental health interventions and improve Canadian public health policy and practice<sup>vii</sup>.

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### Increasing Work Flexibility

Since the COVID-19 pandemic emerged, work-life balance has been a priority item. With an exponential increase in employees working from home, it became harder than ever to separate job responsibilities and familial and personal duties. Without “balance”, employee burnout remains a significant risk for employers. According to Forbes, 41% of burnout is caused by unfair pay, 32% is caused by unreasonable workload, and 32% is caused by too much overtime. And, Fingerprint for Success reports that 51% of workers say they have missed important life events because of work commitments<sup>viii</sup>.

The Great Resignation exemplifies the likely permanent evolution in work expectations. People expressed their dissatisfaction at work by leaving in epic droves. The U.S. Bureau of Labor and Statistics ‘Quits Rate’ has remained at historically high levels for over a year<sup>ix</sup>. If businesses want to retain workers, they need to look at what the research is showing them. A Bamboo HR survey of 2,000 American workers revealed that 62% of people prioritize increased or better compensation, 43% an improved work-life balance, and 42% more flexibility at work.

Not surprisingly, companies are looking to mitigate against burnout and poor company culture resulting from overworked employees by considering alternatives to a “traditional” employment relationship, including four-day workweeks, hybrid work environments, and other “flex” arrangements.

### *Four-Day Work Weeks – Good for Everyone?*

The idea of a four-day work week is not new. In 1956, The New York Times quoted then Vice President Richard Nixon stating that the four-day work week was sitting “in the not too distant future.” And, while not addressing the compensation question, a four-day work week helps resolve two primary concerns leading to employee resignations: balance and flexibility.

In 2018, Perpetual Guardian, a New Zealand-based estate planning company, switched to a four-day workweek and Auckland University of Technology measured and collected data. The results demonstrated: (1) a better work-life balance; (2) lower stress; and (3) higher employee satisfaction.

This was not an anomaly. In 2022, researchers at the University of Cambridge, supported by researchers at Boston College and the think tank Autonomy, worked with 61 companies and organizations in the UK to implement a 20% reduction in working hours over a six-month trial period. Companies that participated could adopt different methods to “meaningfully” shorten their employees’ workweeks — from giving them one day a week off to reducing their working days in a year to average out to 32 hours per week — but had to ensure the employees still received 100 percent of their pay. The study recently closed, with stunning results.

Of the 61 companies that took part in the trial, 56 said they would continue to implement four-day workweeks after the pilot ended, 18 of which said the shift would be permanent. Two companies are extending the trial. Only three companies did not plan to carry on with any element of the four-day workweek. 15% of employees who participated said that “no amount of money” would convince them to go back to working five days per week<sup>x</sup>.

Critics of a four-day workweek tend to focus on productivity and profitability. The results assuaged any such concerns. Revenue increased by an average of 1.4% over the study period, according to data from 23 organizations that provided it. Absenteeism fell, and people were less likely to quit during the trial, even though it took place during what’s been dubbed the Great Resignation, the authors noted. *See id.*

For companies that are eager to try a four-day workweek, there are still legal pitfalls to consider. For example, employees are still entitled to overtime if they work over eight hours per day or 40 hours per week in California.

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This is regardless of the number of days that they actually work during the week. Employers in California may be trying to pressure employees to work longer hours since they are working shorter days during the week, but doing so would be improper. If a California employee works over eight hours per day, the employee is eligible for overtime time for all time work after the eighth hour. California gives employers the option to switch to an alternative schedule such as four 10-hour days per week without owing overtime pay. But getting state approval is a complicated process with a secret-ballot vote needing two-thirds approval by the employees who will be affected.

In addition, individuals with cognitive disabilities or mental health issues may not be able to achieve the same productivity level with a condensed schedule. Problems could also arise with managing leave under the Family and Medical Leave Act ("FMLA") and Americans with Disabilities Act ("ADA") in light of a new structured schedule.

Companies with unionized work forces must also consider the steep challenge to implementing a four-day work week, as a change to those employees' work schedules would be a mandatory subject of bargaining. However, major United States unions, such as the AFL-CIO, have indicated they would support setting 32 hours as the new standard work week under federal labor law<sup>xi</sup>.

### ***Hybrid – Remote Work Arrangements and Legal Implications***

Remote work already was a growing trend before the COVID-19 pandemic, and that trend rapidly accelerated when the pandemic hit in early 2020. Even as conditions have improved and restrictions have been lifted, many employers and employees have found benefits in remote work, while others welcomed the return to in-person. A third group prefers a hybrid approach, blending remote and in-person working. Sixty-three percent of employers offer hybrid work opportunities to most workers, according to the Society for Human Resource Management's 2022 Employee Benefits Survey<sup>xii</sup>.

Some of the most common employment law issues surrounding hybrid working practices include: (1) how discrimination claims can arise from operating a hybrid working practice; (2) disability accommodation issues; and (3) issues that need considering when monitoring employees working remotely.

#### **Discrimination Claims in the Hybrid Environment**

Hybrid working could lead to a "proximity bias" or indirect discrimination. According to Harvard Business Review, working women with children are 50% more likely to prefer working from home than men. Working mothers may prefer remote work for many reasons, with the foremost being the opportunity for better work/life integration<sup>xiii</sup>. The proportion of women to men working remotely isn't the problem; the concern is how the new hybrid workplace could create more opportunities for existing bias to harm women and present new barriers to success. In the same research, HBR found that remote employees had a 50% lower rate of promotion compared to their colleagues working in the office, which suggests that women working remotely with children at home may be at risk of falling even further behind in the business world.

As part of their inclusion programs, companies should give serious thought to whether they are prepared to support these new ways of working, including by supporting managers in developing and setting direction for hybrid teams in an equitable manner. Companies should also ensure that their formal review processes are able to capture the contributions of those working from afar.

#### **Disability Accommodation in the Hybrid Environment**

Starting in 2022 and continuing into 2023, we have seen more employers begin to require employees working full remote to return to the office and/or work a hybrid schedule. Unsurprisingly, not all employees have been receptive to demands to return to an office or in-person environment. Under the ADA, employers must provide

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disabled employees with reasonable accommodations unless doing so would pose an undue hardship. Even before the pandemic, employees could — and did — request remote work assignments as reasonable accommodations. In the wake of the pandemic, however, a few things have changed.

First, because many employees have grown accustomed to working from home and do not want to return to the office, they may be more inclined than before to request an accommodation. Similarly, requesting an accommodation is not a foreign concept; employees became far more familiar with the ADA and its requirements when vaccine mandates were on the table and medical exemptions widely discussed.

Second, because the pandemic forced many employers to adapt to work-from-home arrangements, some employees are now better equipped to argue that working from home is a feasible, and therefore reasonable, accommodation.

Pre-pandemic, the U.S. Equal Employment Opportunity Commission (“EEOC”) advised that “[t]he ADA does not require an employer to offer a telework program,” but that an employer that chose to do so “must allow employees with disabilities an equal opportunity to participate in such a program.”<sup>xiv</sup> Companies implementing such programs might issue documentation outlining the technical aspects of these arrangements, such as requirements that employees have secure network access and a physically appropriate workspace, stipulating that remote work was not meant to facilitate child care or other family responsibilities during work hours, and reserving the option to withdraw these arrangements at any time. However, pre-pandemic, employers commonly argued, with courts agreeing, that “physical attendance in the workplace [was] itself an essential function of most jobs.”<sup>xv</sup> As a result, employees seeking telework to accommodate physical impairments that were aggravated by workplace conditions often found their claims dismissed as unreasonable<sup>xvi</sup>. In a 2015 en banc ruling, the U.S. Court of Appeals for the Sixth Circuit rejected an employee’s telecommuting request, declaring, “Regular, in-person attendance is an essential function—and a prerequisite to essential functions—of most jobs, especially the interactive ones.”<sup>xvii</sup> In addition, the court rejected the EEOC’s argument that technology had advanced enough to permit at least partial remote work, stating “[N]o record evidence—none—shows that a great technological shift has made this highly interactive job one that can effectively be performed at home.”<sup>xviii</sup>

We expect the same result would not be reached today. Between March 2020, when the World Health Organization declared COVID-19 a pandemic, and April 7, 2020, 42 states, the District of Columbia and Puerto Rico imposed various forms of “stay at home” or “lockdown” orders, with exceptions for narrow categories of “frontline essential” workers. Businesses across a wide range of industries quickly moved to a remote-work model, typically without formal policies and without a detailed review of essential functions for individual roles. And, while many of these lockdown orders were scaled back over the summer and fall of 2020, continuing concerns about COVID-19 transmission kept these remote work arrangements in place far longer than anyone could have anticipated. This was especially true in workplaces that linked return-to-office plans to COVID-19 vaccination, with remote work often becoming a default accommodation for employees who could not obtain the vaccine.

Companies should also expect employees who have worked remotely for more than two years will likely be prepared to show that they have worked just as well, or even more productively, outside the workplace. The EEOC has already taken interest in this case and filed its first COVID-19-related disability accommodation suit involving a claim from a worker who was recalled to her physical worksite in mid-2020 after the lifting of pandemic-related restrictions.<sup>xix</sup> She allegedly requested to continue partial remote work because of a pre-existing pulmonary condition, but her request was denied and she was fired. Companies must be prepared for a fact-specific examination of a job’s essential functions, as the ADA contemplates. Blanket statements about the “essentialness” of in-person work are no longer persuasive.

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### Monitoring Employees Working Remotely

With more and more employees working remotely or on a hybrid-basis, companies are exploring various options to monitor employee performance and engagement. Certain employers have responded by turning to technology to measure remote employee productivity, improve efficiency, and ensure accountability. Examples include instant messaging apps that reflect "active" or "away" statuses, software that counts keystrokes or scans an employee's face, and GPS monitoring. While employee monitoring can serve important purposes — including making remote work possible for those employees who prefer it — there are potential pitfalls that employers should consider.

One such risk is allegations of an unfair labor practice. On October 31, 2022, Jennifer A. Abruzzo, General Counsel for the National Labor Relations Board in her Oct. 31, 2022, issued a memo regarding Electronic Monitoring and Algorithmic Management of Employees Interfering with the Exercise of Section 7 Rights, in which she described how an employer might run afoul of the National Labor Relations Act (NLRA)<sup>xx</sup>.

Two sections of the NLRA form the background for the General Counsel's memo. One is Section 7, which, among other things, guarantees employees the right "to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection."<sup>xxi</sup> The other is Section 8, which prohibits employers from interfering with, restraining, or coercing employees in the exercise of their Section 7 rights.<sup>xxii</sup> These protections have long been interpreted to apply equally to union and nonunion employees who engage in concerted activity. "It concerns me that employers could use these technologies to interfere with the exercise of Section 7 rights under the National Labor Relations Act by significantly impairing or negating employees' ability to engage in protected activity—and to keep that activity confidential from their employer," said General Counsel Abruzzo. "Thus, I plan to urge the Board, to the greatest extent possible, to apply the Act to protect employees from intrusive or abusive electronic monitoring and automated management practices that would have a tendency to interfere with Section 7 rights." See FN. 20.

Another concern is federal and state privacy laws. The most significant restrictions on electronic privacy derive from the federal Electronic Communications Privacy Act of 1986 (ECPA), which generally prohibits employers from intentionally intercepting their employees' electronic communications, including emails and instant messages<sup>xxiii</sup>. There are two exceptions to the ECPA that may apply in the employment context. One is the "business purpose exception," which permits an employer to intercept electronic communications when doing so is necessary for the performance of duties in the normal course of employment, or to protect the rights or property of the employer<sup>xxiv</sup>. The second is the "consent exception," which applies to allow the interception of electronic communications if the employer has the employee's consent<sup>xxv</sup>. Although explicit consent is not required, an employer that intends to rely on this exception must make it clear in advance that the employer will monitor employees' electronic communications.

Currently, at least three states — Connecticut, Delaware, and New York — have enacted laws that require employers to notify employees of electronic monitoring<sup>xxvi</sup>. The Connecticut and New York laws mandate that an employer post its notice "in a conspicuous place."<sup>xxvii</sup> The Delaware law requires an employer that monitors telephone calls, emails, or internet usage either to provide employees daily notice of its monitoring practices, or to obtain a one-time written or electronic acknowledgment of those practices from its employees.<sup>xxviii</sup>

Other states may soon follow. In April 2022, California introduced legislation that would have significantly regulated employee monitoring, including by: (1) requiring notice of electronic monitoring; (2) prohibiting employee monitoring during off duty hours or while employees are using personal devices; and (3) prohibiting an employer from using algorithms to determine if or when an employee should be disciplined or fired. And, although the California legislation was withdrawn, it reflects the direction that some states might take on this



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issue.

<sup>i</sup> WHO (2022). *WHO Coronavirus (COVID-19) Dashboard*. <https://covid19.who.int/>.

<sup>ii</sup> 2023 Large Employers' Health Care Strategy and Plan Design Survey (August 23, 2022) <https://www.businessgrouphealth.org/resources/2023-plan-design-full-report>

<sup>iii</sup> Medical News Today, *How can the COVID-19 pandemic affect PTSD?* (Medically reviewed by Timothy J. Legg, PhD, PsyD, May 13, 2020) <https://www.medicalnewstoday.com/articles/ptsd-and-covid-19#causes>

<sup>iv</sup> Rising Stress and Burnout in Public Health, Results of a National Survey of the Public Health Workforce (March 2022) [https://debeaumont.org/wp-content/uploads/dlm\\_uploads/2022/03/Stress-and-Burnout-Brief\\_final.pdf](https://debeaumont.org/wp-content/uploads/dlm_uploads/2022/03/Stress-and-Burnout-Brief_final.pdf)

<sup>v</sup> University of Michigan, Posttraumatic Stress Disorder During COVID-19 <https://medicine.umich.edu/dept/psychiatry/michigan-psychiatry-resources-covid-19/specific-mental-health-conditions/posttraumatic-stress-disorder-during-covid-19>

<sup>vi</sup> Business Insider, 13 Potential Long-Term Effects the Coronavirus Pandemic Could Have on Mental Health (June 2020) <https://www.businessinsider.com/potential-mental-health-effects-of-coronavirus-pandemic-2020-6>

<sup>vii</sup> Public Health Agency of Canada, Government of Canada Invests \$28.2 Million in Mental Health Support for Trauma and Posttraumatic Stress Disorder (June 26, 2022) <https://www.canada.ca/en/public-health/news/2022/06/government-of-canada-invests-282-million-in-mental-health-support-for-trauma-and-posttraumatic-stress-disorder.html>

<sup>viii</sup> Rob Errera, TonerBuzz, Eye-Opening Work-Life Balance Statistics (February 15, 2022) <https://www.tonerbuzz.com/blog/worklife-balance-statistics/>

<sup>ix</sup> U.S. Bureau of Labor Statistics, Quits Levels and Rates by Industry and Region, Seasonally Adjusted <https://www.bls.gov/news.release/jolts.t04.htm>

<sup>x</sup> Autonomy, The Results Are In: The UK's Four-Day Week Pilot (February 2023) <https://static1.squarespace.com/static/60b956cbe7bf6f2efd86b04e/t/63f3df56276b3e6d7870207e/1676926845047/UK-4-Day-Week-Pilot-Results-Report-2023.pdf>

<sup>xi</sup> Bloomberg Industry, Chris Marr, Four-Day Work Week Means Navigating Overtime Pay, Union Talks (December 20, 2022) <https://news.bloomberglaw.com/daily-labor-report/four-day-work-week-means-navigating-overtime-pay-union-talks>

<sup>xii</sup> Society of Human Resources Management, 2022 Employee Benefits Survey <https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/Pages/Flexible-work.aspx>

<sup>xiii</sup> Harvard Business Review, Nicholas Bloom, Don't Let Employees Pick Their WFH Day (May 25, 2021) <https://hbr.org/2021/05/dont-let-employees-pick-their-wfh-days>

<sup>xiv</sup> EEOC, Fact Sheet, Work at Home/Telework as a Reasonable Accommodation, at Question 4 (Oct. 27, 2005), available at <http://www.eeoc.gov/facts/telework.html>.

<sup>xv</sup> *Mason v. Avaya Communications, Inc.*, 357 F.3d 1114, 1119–124 (10th Cir. 2004) (noting that jobs that can be performed entirely from home, instead of at the workplace, are the exception to the rule).

<sup>xvi</sup> *Mulloy v. Acushnet Co.*, 460 F.3d 141, 147–54 (1st Cir. 2006) (holding that an employee's request to work remotely to accommodate his asthma, which was aggravated by exposure to workplace chemicals, was per se unreasonable because physical presence was an essential function of the job and removing that requirement would redefine the role altogether).

<sup>xvii</sup> *EEOC v. Ford Motor Co.*, 782 F.3d 753, 762 (6th Cir. 2015).

<sup>xviii</sup> *Id.* at 765.

<sup>xix</sup> *EEOC v. ISS Facility Services, Inc.*, No. 1:21-CV-3708-SCJ-RDC (N.D. Ga., filed Sept. 7, 2021).

<sup>xx</sup> National Labor Relations Board, Office of Public Affairs, NLRB General Counsel Issues Memo on Unlawful Electronic Surveillance and Automated Management Practices (October 31, 2022) <https://www.nlrb.gov/news-outreach/news-story/nlrb-general-counsel-issues-memo-on-unlawful-electronic-surveillance-and>

<sup>xxi</sup> 29 U.S.C. § 157

<sup>xxii</sup> 29 U.S.C. § 158

<sup>xxiii</sup> 18 U.S.C. §§ 2510, et seq.

<sup>xxiv</sup> 18 U.S.C. § 2511(2)(a)(i)

<sup>xxv</sup> 18 U.S.C. § 2511(2)(d)

<sup>xxvi</sup> Conn. Gen. Stat. § 31-48d; Del. Code tit. 19, § 705; N.Y. Civ. Rights 52-c

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<sup>xxvii</sup> Conn. Gen. Stat. § 31-48d; N.Y. Civ. Rights 52-c

<sup>xxviii</sup> Del. Code tit. 19 § 705