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Brave New "Labor" World

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Disney's Bob Iger recently announced that remote staff will be required to return to in-office work four days a week, beginning in March.[i] Last fall, even as Covid-19 cases were still manifesting in rollercoaster peaks and valleys, Tim Cook confirmed Apple's hybrid work policy would now mandate three days in the office.[ii] Both CEOs insisted that there is no substitute for in-person collaboration among their staff, not just their creative work force. Elon Musk, of Tesla and Twitter, implemented return to work policies at both companies. So, with some of the world's most recognized companies scaling back on remote work, one might conclude that work from home is on the way out.

It is not. Both Disney's Iger and Apple's Cook went to great lengths to remind employees and the public that in office work was not full time. Even so, push back from employees was swift and continues now, months later. A relatively small group of Apple employees, Apple Together, started a petition (https://appletogether.org/hotnews/thoughts-on-office-bound-work.html) and while the numbers are small, the media coverage for the group has been extensive. The petition's conclusion: "Office-bound work is a technology from the last century." As support, Apple Together points out that during the pandemic, when work from home was the rule, Apple actually realized increased earnings. Elon Musk put the counter-point succinctly when referring to the Tesla, mandatory 40 hours in the office policy, he tweeted that Tesla employees and executives can get on board or "pretend to work somewhere else."iii

The battle lines are drawn, but what is actually happening in the workforce? In January, the Bureau of Labor Statistics (bls.gov) published the following data:

1. As of February 2023, Non-Farm Unemployment was (is) at 3.5%, historically low ,with 64.2% participation in the labor force.
2. Job growth was (is) "widespread" with significant gains in leisure and hospitality, professional and business services, and health care.
3. Labor productivity, output per hour, increased in 2022.
4. Employer Compensation Costs for civilian, non-unionized workers averaged at $41.86/hour worked, across the board in 2022. Of that, $28.88/hour worked was allocated to wages/salaries and $12.98/hour worked accounted for benefits. This does not include company costs for cultural/workplace enhancements and perks.
5. Compensation costs overall in 2022 increased 5.1 %; in 2021, the increase was 5.0%.
6. Adjusted for *inflation,* wages and salaries *decreased 1.2% in 2022.*

There are lots of jobs in certain industries and educated, professional talent is at a premium. Workers that want employment are, by and large, finding it. And, the average hourly wage is going up, but it is not keeping pace with inflation. Recession may be on the horizon and as inflation continues, workers' adjusted wages are not keeping pace. They are feeling the pinch, or anxiety about the pinch ahead. And, they are apt to move jobs for a myriad of reasons, which in today's market, are not hard to come by.

Hybrid Work from Home.

Despite big companies ~~like~~ implementing return to office policies, analysts all agree that work from home is here to stay.[iv] ResumeBuilder.com, an on-line service to help workers build portfolios and job search, surveyed 1,000 business leaders about their work from home plans for 2023. The results, while anecdotal, report that as many as 90% of their respondents intended to require workers to return to the office and 21% said they would terminate employees who refused. At the same time, 74% of these same leaders reported they still planned to hire remote workers, and they acknowledge that flexible work environments are a must to attract the talent they want. That means hybrid (part time) return to the office policies are the mechanism that companies are adopting. That is precisely what Apple and Disney are doing. In fact, according to ResumeBuilder and their respondents, most companies that either already have a hybrid work from home policy or that will be implementing one within the next 6 months, will go to a mandatory three-day office standard.

A recent joint study done by researchers at Stanford University, the University of Chicago and the Instituto Tecnológico Autónomo de México, gives us four key results. First, hybrid work was highly valued by employees on average, reducing attrition by 33% and improving job-satisfaction measures. Second, hybrid reduced working hours on home days and increased them on office days and the weekend, altering the structure of the working week. Third, hybrid increased messaging and video calls, even when all employees were in the office, reflecting a move towards more electronic communication. Finally, there were large differences in the valuations and perceptions of hybrid between managers and non-managers. Non-managers were more likely to volunteer into a hybrid system, to work from home on eligible days, to predict positive impacts on productivity, and to cite a reduction in their attrition tendencies under hybrid. In contrast, managers were less likely to volunteer, less likely to work from home on eligible days, predicted a negative average impact of hybrid on productivity, and cited increased attrition rates under hybrid.[v]

Note the divergence between the first finding. While workers say hybrid working increases productivity, managers predict a negative impact on productivity. Almost every study done reaches the same result: workers at home are more productive, and bosses still do not like it and do not believe it (cite: Elon Musk). Trying to find a balance that meets both worker and management needs should not only focus on the time split between remote and office work, but also on other aspects of the work from home environment that can bring positive developments to both groups. While the statistics are still developing, there are some generally held beliefs about the perks of hybrid or full-time work from home that warrant consideration:

1. Commute time and expenses are down for the employee. In modern urban areas, this can recapture a lot of time for both worker and employer every day. Anecdotally, this is the aspect of work from home most employees list first. It's not the "I don't have to get dressed" or "I can work non-conventional hours." It's the commute time and costs, and lunch costs too.
2. Being open to remote work allows employers to diversify their workforce, to include those with transportation obstacles, disabilities, and working parents who would have left the workforce entirely just five years ago.
3. It expands the labor pool. In a true remote work environment, the best candidate may live out of state, or out of the country. That is especially true for specialized roles.
4. The office footprint is a lot smaller and the cost savings can be enormous. Hoteling – scheduling in advance a shared office space for workers who are not full time - is the new trend (although banks and credit unions had this figured out decades ago). In 2002, Yelp closed offices in New York, Washington and Chicago. They put some savings towards employee benefits and hiring. Lyft rented out some of its office space in San Francisco, New York, Seattle and Nashville.

Capitalizing on these benefits to employers can help mitigate the difficulties managing a remote work force. This is not to minimize the obstacles of remote work, and there are lot of them. But, because remote work is here to stay, diving down on the challenges, and embracing the new world order by thinking about those challenges is important for all employers.

Work From Home Productivity.

This is the most obvious and often obstacle for most employers. Apart from the obvious – was the work assigned completed - how do you know your employees are working when they are not in the office? To illustrate this conundrum, consider the employer who when the pandemic started, provided laptops with cameras to its employees and required the cameras be active during work hours. The employer stressed it was important that it (he, the owner) be allowed to verify his workers were actually working. The reality of such a measure was far more problematic. First, there is the obvious recoil that workers will feel; the word is spying. Second, in most states it is illegal to record conversations you are not a party to. Anytime the employee picks up her phone, or a family member walks in, the employer ran the risk of violating electronic privacy and wiretap laws. A court in the Netherlands recently found that requiring cameras to be kept on while working from home could potentially violate the workers' human rights.

There are a lot of new tracking software and products hitting the market right now. Some are simple time tracking applications, some compile statistics on email response times and frequency, some track which websites and applications are being accessed, and for how long; others track projects. Some software options take data on keystrokes, screen shot or offer live views of the employees' monitors. There are lots of options and lots of tools that can be used to capture output. Even so, caution is in order and the tracking mechanisms chosen should be appropriate for the type of work being monitored and with fair consideration for quantity, over quality. Meaning, auditing the quality and success of the output is equally important come performance review time, as is the actual data establishing times spent on work activities. Finally, if an employer chooses tracking software, it should consider whether the use should be limited to remote workers only and whether each worker should be permitted to see the tracking reports periodically for transparency and self-evaluation.

Off the Traditional Clock.

Regular work hours do not have to be a thing of the past, and they are not for many customer-facing industries. But, when employees work remotely, and particularly when those employees previously had specific in office hours, managers often default to an "on call" expectation when communicating with employees, regardless of those employees' established work hours. This is still a problem, particularly for non-exempt workers for whom the wage/hour laws are still applicable.

The key to effective management of off the clock work and productivity is still the same: it's up to the managers to implement effective guard rails and enforce policies with appropriate supervision and monitoring tools. If for example, an employee prefers the ability to work in the evenings, but not regularly and at their election, then timekeeping software will be more useful than email response time.

Work Related Expenses.

Most companies have developed some sort of personal electronic device (PED) policy. Before 2020, workers used their own phones, computers, printers and the problems and obstacles associated with these practices are well known, as are the benefits and conveniences. However, in the last few years, with so many workers at home, expenses have become a hot button issue, particularly in the six states that mandate reimbursement of work expenses for remote employees.[vi]

In California, Amazon is facing a state-wide class action for reimbursement of home office related expenses including cell phone use, home wi-fi/internet fees and additional electricity. Other class actions seek computers, paper, printers, desk, chair and even fair value of the physical space allocated as a work office. Most of the actions are resolving out of court, but the Amazon matter is currently moving forward. Some companies are choosing to pay upfront stipends or subsidies for remote work. Last year, Deloitte announced a $500 work from home technology subsidy to help defray costs.[vii] Plaintiffs in the various lawsuits are seeking between $50-$200/month.

On the Job Injuries and Home Offices.

Injuries at home, but on the job are compensable and that isn't anything new. Remote workers are sitting on their couches, at their kitchen tables, their beds, and their coffee tables. They're sitting hunched over their keyboards and laptops, peering at their monitors at less-than-ideal angles. As a result, we've seen a significant uptick in back, neck and shoulder strains and injuries that are not necessarily acute.

What is an "on the job" injury is still murky when it happens at home. Consider an employee who is on the phone, a work-related call, but walking to get a glass of water. He trips over a piece of furniture. This injury is probably compensable in most states. There was a case out of Germany involving walking to the mailbox to retrieve the day's mail, both personal and business related. The fall was compensable. So, while an employer cannot generally control clumsiness, for remote work employes, it is worth at least a discussion about the work environment.

That's for workers' compensation purposes. OSHA has made its stance clearer in the last few years. While it might be advisable for an employer to focus on home workplaces, OSHA does not mandate ergonomic chairs and desks. Nor does it, generally, consider home offices as workplaces within its purview. In 2020, just as the pandemic was ramping up, OSHA issued some helpful guidance. OSHA does not consider home based worksites, where office work activities take place, as within its purview. Specifically, OSHA says that it will not conduct inspections of home work offices, and notably it "will not hold employers liable for employees' home offices, and does not expect employers to inspect" them.[viii] There are exception for home based work that is not office work and could be dangerous, like electronics assembly, casting lead head jugs, crimping machines, adhesives, etc., and in certain complaint situations or a work-related fatality. However, by and large, OSHA will stand down in most home office environments.

Confidentiality.

Confidentiality is a huge concern for remote workers, and U.S. Presidents. Many remote workers are professionals. They work in health care, insurance, finance, legal and sales. Financial information, personal identifying information, privileged information and communication and trade secrets are all at risk for inadvertent disclosure in remote working environments.

This is a well-tread area for most employers. However, some of the implications are not as obvious. For example, in 2020, a Delaware court denied a company trademark protection because, during a Zoom meeting, the company failed to take advantage of readily available Zoom features to ensure privacy. The Zoom meetings were open, allowing almost anyone to attend after a brief introductory call; the company gave out is Zoom information, including the meeting ID freely, and did not change its meeting ID thereafter; it did not use passcode access or use host control/waiting room functions. All of this led the court to conclude the company did not take reasonable measure to protect its trade secrets.[ix]

Quiet Quitting.

Elon Musk does have one thing right: there are some workers who will do the minimum and remote working environments do make that easier. A manager might describe "quiet quitting" as an employee refusing to anything that isn't strictly within their job description, and that is a bad thing for competitive advantage, collaborative culture and job satisfaction. Employees might describe "quiet quitting" as decision to focus on the job description and expectations my employer established when I was hired, and to step back from working long hours and attending non-mandatory meetings, disengaging in corporate culture outings, and instead choosing to use that time and energy focusing on non-work related wellness issues. Regardless, it's here and it's real. Gallup recently estimated that "quiet quitters" make up at least 50% of today's workforce.[x]

Employee engagement is still highly valued by employers. Naturally, employers value and desire their colleagues to be engaged and happy about their engagement. Quiet quitting is particularly problematic because, while employers recognize some employees are not great fits, moving on is the answer. Staying around and only hitting the minimum expectations can make personnel improvement plans and performance evaluation difficult and can hamper companies' efforts to move forward on a larger scale. The employer response might become: that minimum is no longer the minimum, even in today's tight market.

The yang to "quiet quitting's"' yin – "quiet hiring" - is getting a lot of buzz right now.[xi] What exactly is "quiet hiring" is still not certain. Some analysts describe it as simply prioritizing upward mobility and internal hiring, rather than filling vacancies externally or creating all new positions. Others describe it as using talent to fill emergency and most critical needs, like when Quantas Airlines executives rated as baggage handlers for a brief time.[xii] Still others say this is "much ado about nothing" and that "quiet hiring" is just a catchy new buzz word for long-standing practices, and using the term helps address the perception that a company isn't doing anything about staffing shortages or an under-performing work force. Time will tell whether a solid "quiet hiring" movement is effective at addressing productivity and performance problems attendant to a growing portion of the workforce that is stepping back from traditional ambition and advancement as part of their work life goals.

Work Culture Initiatives and Amenities.

Higher pay and work from home isn't the only common ask for employees in 2023. Analysts, companies, and a whole lot of desperate clients are reporting that employees are focused on several other areas for improvement in work satisfaction.

Almost every workplace analyst emphasizes that health and wellness is a developing priority for the work force. Employees are asking employers to contribute and not just by providing insurance. Employees are asking for fitness facility memberships or access to company owned gyms, as well as increases in paid leave for wellness purposes. Those perks are quite expensive, but becoming more common.

Younger entrants into the workforce, and notably college graduates are also increasingly asking about employers' diversity, equity and inclusion initiatives as well as environmental, social and governance programs. DEI and ESG are no longer issues discussed in the C-Suite only. Employees want to know their employers are focused on these matters with deliberate, concrete initiatives and measures.

Conclusion

Just as this article was being completed, Disney announced 7,000 layoffs. There's little doubt we are headed for a difficult time. However, even with more downsizing ahead, the expectation is that we will continue to be in a labor driven market. While we all hear anecdotes of unemployed workers searching for months or years, the facts do remain that unemployment is historically at an all-time low and the January 2023 jobs report revealed over 517,000 jobs added in the month alone (outpacing expectations by 330,000 jobs), and the largest gains in the last six months. Wages are up 4.4% over last year. Finally, the government reports an average 1.9 open jobs for every unemployed person.[xiii] Twice as many jobs and job seekers.

Employers will need to continue to consider alternative work arrangements, including workers' wish lists, as well as other workplace engagement and culture initiatives in order to attract and keep talent.

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[i] Disney's Bob Iger Told Staff to Return to the Office 4 Days a Week (businessinsider.com)

[ii] Apple tells employees to come in 3 times a week starting September (cnbc.com)

[iii] When Musk rolled out the return to office mandate at Twitter, it wasn't exactly smooth. The backlash was immense. The offer of optional severance almost backfired because so many employees indicated they would rather leave than return to the office under the other new policies part of what Musk called "Twitter2.0." Lawsuits were filed under the Americans with Disabilities Act and persons who had been laid off just weeks before were called back into service.

[iv] The 5 biggest workplace trends of 2023: report Glassdoor and Indeed (fastcompany.com); Future Of Work: The 4 Biggest Workplace Trends In 2023 (forbes.com); www.bloomberg.com/news/articles/2022-12-23/will-work-from-home-continue-in-2023-if-there-s-a-recession

[v] https://www.nber.org/papers/w30292

[vi] California, Iowa, Montana, Massachusetts, New York and Illinois. There is also some fair debate about whether to include North Dakota on this list.

[vii] https://www2.deloitte.com/us/en/pages/about-deloitte/articles/expanding-employee-benefits.html. That's not the only benefit being rolled out. In addition, Deloitte increased paid holidays to 15 a year, added a health and wellness stipend, and a temporary expansion of commuter costs reimbursement to *encourage* hybrid working. The reason: retention and a competitive labor market.

[viii] https://www.osha.gov/enforcement/directives/cpl-02-00-125

[ix] *Smash Franchise Partners, LLC v. Kanda Holding, LLC,* 2020 WL 4692287 (August 2020)(vacated in part on other grounds).There were several factors and analysis leading to this conclusion, and the court could have been influenced by its other findings, including that much of the information at issue was not a trade secret. However, the importance of taking measures to protect confidential information in a work environment bears repeating. There is exposure on this subject, and the technology is readily available to companies. Use it.

[x] https://www.gallup.com/workplace/398306/quiet-quitting-real.aspx

[xi] https://www.yahoo.com/now/quiet-hiring-opposite-quiet-quitting-174958836.html

[xii] Gartner HR expert: Quiet hiring will dominate U.S. workplaces in 2023 (cnbc.com)

[xiii] https://www.bls.gov/news.release/pdf/empsit.pdf