

Hot Workforce Topics in 2023: Remote Work and Pro-Employee Movements

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As with any organizational division, the laws and regulations surrounding human resources and people operations grow and evolve alongside societal expectations and views. The year 2023 represents a time of shifting attitudes toward the workplace and workforce, with the effects of the COVID-19 pandemic continuing to wax and wane, pro-employee movements taking place in high-profile industries, and the make-up of the U.S. Supreme Court and the rest of the federal court system on a conservative shift. Keeping up with the hot topics ensures employers understand their workforce and the issues facing them.

COVID-19 and Remote Employees

Without a doubt, the COVID-19 pandemic has been the most significant shift in individual workplaces and the workforce at large in a generation. Ignoring the effect of the lost lives, the view of the work-life balance brought by the quarantine, and the shift of the workforce market to put more power in the hands of employees, the pandemic introduced a new concept that has completely changed the work environment—remote work.

Every industry has had to grapple with the availability of remote work in different ways. But considering a remote work policy has become a necessary evil for workplaces where productivity can remain the same (or similar) with a remote work structure. As with all work policies, there are pros and cons to consider.

For employees, the availability of remote work means the elimination of the daily commute, flexibility between work life and personal demands, and more contact with family. But a fully remote work environment can also create “FOMO”—the fear of missing out on the personal relationships that grow in a physical workplace, and many employees actually need the structure of on-site work. For employers, remote work means employees can be productive at their own pace and time, a wider pool of employees in different locations, and drastically reduced overhead. But remote work also makes it harder for employers to supervise and monitor employees, resulting in reduced active engagement and productivity.

Of course, remote work also creates new legal issues. In drafting a remote work policy, employers and human resources professionals should consider a variety of possible elements. For example:

- Moonlighting—In any moonlighting policy, employers should note that any outside employment must be disclosed in order to confirm that such employment does not create a conflict of interest or risk exposure of

confidential information. Moonlighting should also be prohibited during regular business hours to ensure productivity.

- **Cameras and Zoom**—As the lawyer who used the accidental cat filter in court knows, video cameras during remote meetings can be tricky. But requiring employees to have cameras on is likely legally enforceable, as long as all employees are required to do so without discrimination. Additionally, be wary of the possibility that an employee may request an accommodation under the Americans with Disabilities Act (ADA), as the anxiety created by being on camera may be a covered disability.
- **Multistate Compliance**—While a remote workplace broadens the pool of employees from which to choose, it also means employers must be aware of where their employees are working. Employers must be registered to do business where employees have their “home office” location and will be subject to the laws of the state where that office is located. This also creates tax consequences and requires compliance with the unemployment provisions of that state.

Many employers are also considering the legality of a full return to office. For the most part, this is allowed, but COVID-19 demonstrated that many essential functions of certain jobs can be performed by teleworking. The U.S. Equal Employment Opportunity Commission (EEOC) has offered guidance that if essential functions had to be limited to permit telework, then a full return to office is justifiable. However, if employees can perform all essential functions successfully and remotely, physical presence in the office may not be essential to the job. Additionally, any requests for accommodations under the ADA should be honored, and if remote work is part of such accommodation, then a forced return to work could create legal liability.

Outside of the legal perspective, the implications on morale should inform the prospect of a forced return to work. Many younger employees who entered the workforce during the pandemic know nothing but remote work, and existing employees may have grown comfortable with the policy. As with most situations, the best policy is to communicate openly and clearly with employees about remote work options and in-office expectations. After all, remote work has shown it’s not going anywhere soon.

Pro-Employee Movements

Despite numerous efforts by various political entities to silence diversity, equity, and inclusion (DEI) efforts, another shift since the start of the pandemic has been a pro-employee movement. The most high-profile of these has been the Hollywood strikes by the Screen Actors Guild and the Writers Guild of America. But two with an even more direct, immediate impact on employers, and especially on female employees, are the implementation of the Pregnant Workers Fairness Act (PWFA) and the push for pay transparency laws.

The PWFA codified at 42 U.S.C. Section 2000gg, amends Title VII of the Civil Rights Act of 1964 to require covered employers (including those with at least 15 employees, federal agencies, and labor organizations) to provide reasonable accommodations to workers with known limitations related to pregnancy, childbirth, or related medical conditions. It went into force on June 27. While part of Title VII, the PWFA shares language with other federal anti-discrimination laws. The process of determining a “reasonable accommodation” is shared with the ADA, and any request for leave under the PWFA may interact with the Family Medical Leave Act, which provides for 12 weeks of unpaid protected leave.

In any case, “known limitations” may include obvious symptoms of pregnancy-related limitations, such as morning sickness or fatigue, but others may be less obvious. Federal agencies such as the EEOC will likely begin implementing regulations to explain further what applies as a limitation. As with the ADA, employers and employees must engage in an interactive process when considering whether a request for a reasonable accommodation is available. The Committee on Education and Labor has identified specific examples of reasonable accommodations, including the ability to sit or drink water, closer parking, flexible hours, appropriately sized uniforms, additional break time, and excusal from strenuous activity. And while many states already have similar laws, employers must consider the implications of the law to ensure compliance with both state and federal law.

Additionally, equal pay claims have received increased traction in state and federal court, possibly related to the prominence of DEI initiatives that increase awareness of pay equity issues. Pay equity, based on the well-evidenced wage disparity between minority workers performing the same work as employees who are not part of such minority groups, is codified federally by the Equal Pay Act of 1963, which prohibits discrimination in pay based on sex. States and municipalities have expanded the Equal Pay Act to include other minority groups and require additional steps by employers. For example, Illinois enacted SB 1480, which requires private employers to obtain an Equal Pay registration certifying pay equity for employees based on race, gender, and ethnicity and provide documentation of such. California has enacted a law requiring employers to provide “pay scale” information to applicants upon reasonable request. A second law requires employers with 15 or more employees to post pay information on all job postings at the risk of civil penalties. And in New York, effective September 17, 2023, employers are required to provide a minimum and maximum annual salary or hourly range when posting new jobs and maintain records, including the history of compensation ranges for each position.

Pay transparency is well-intentioned, with the goal of allowing employees to make informed decisions about what companies to work for. As with any new policy, though, employers must consider the legal implications. This includes what state laws may apply, especially with workers in multiple states in a remote working environment, and the possibility that making their pay information public could create exposure for additional claims. Therefore, before making pay information publicly available, employers should consider a pay equity audit to confirm they are compliant with all applicable laws.

The PWFA, in conjunction with the pay transparency movement, represents an ongoing trend and fight for workplace equity for women and other workers who experience pregnancy. Employers should monitor these trends to determine the best strategy for enacting policy and corresponding with their employees.

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