

JacksonLewis

Employee Retention Strategies

Retaining Employees During the “Great Resignation”

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AGENDA

- A summary look at what's driving employees to resign en masse.
- Some best practices for navigating employee retention; and
- Legal pitfalls to avoid in the Great Resignation – including union avoidance strategies, restrictive covenants, and pay disparity concerns.

A look at the numbers

It's an Employee's Market

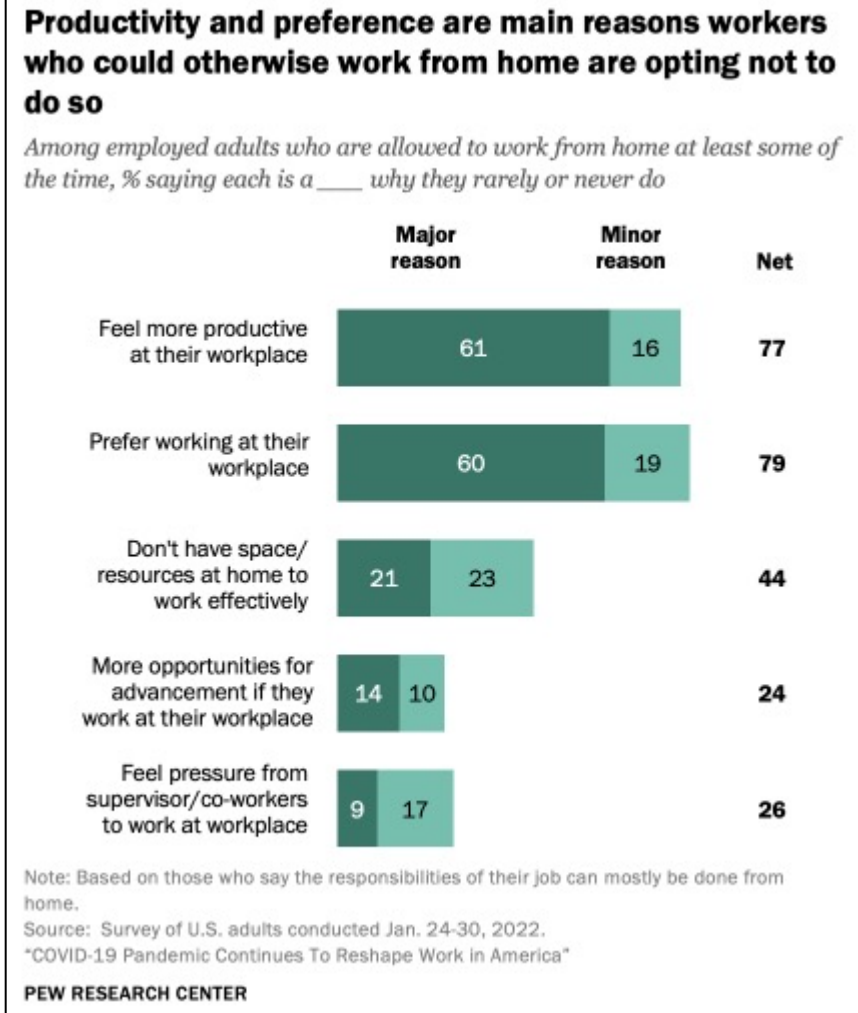
- Job openings have been at a near-record level throughout 2022 – hovering around 11 million for most of the year. Nationwide, the current unemployment rate is 3.6% according to the Labor Department.
- Relatedly, the number of Americans quitting their jobs are near historic highs at over 4 million – most of whom are moving for higher pay and job flexibility. Of course, inflation is also causing employers to raise wages to attract more applicants.



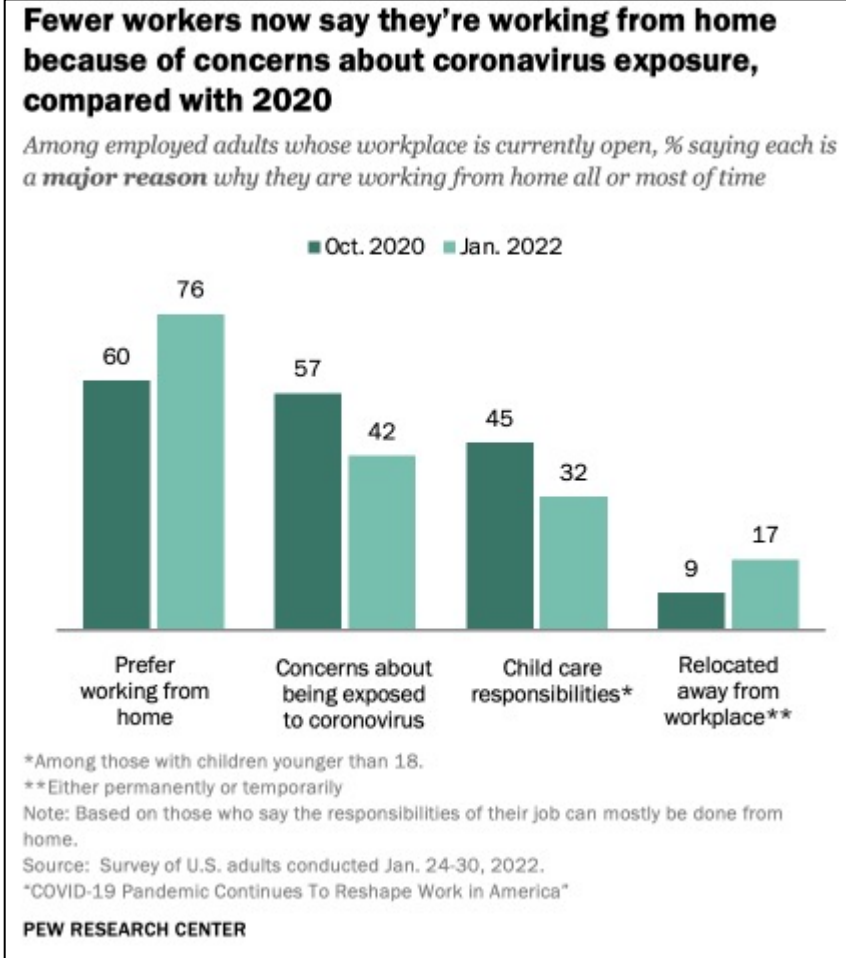
What's **driving** the “Great Resignation”?

- According to a recent Pew Research survey, among those who quit their jobs, the driving reasons included (1) pay; (2) lack of opportunity for advancement; (3) disrespect at work; (4) childcare issues; and (5) lack of flexibility.
- Millennial and Gen Z employees in particular describe the importance of growth-focused feedback and mentorship at work in order to feel “valued” by their employer.
- Employees in low wage sectors – including food and hospitality industries – have been particularly unwilling to tolerate unchanging wages/long hours given leverage in the market.

Why Some Employees Prefer to Return to the Office



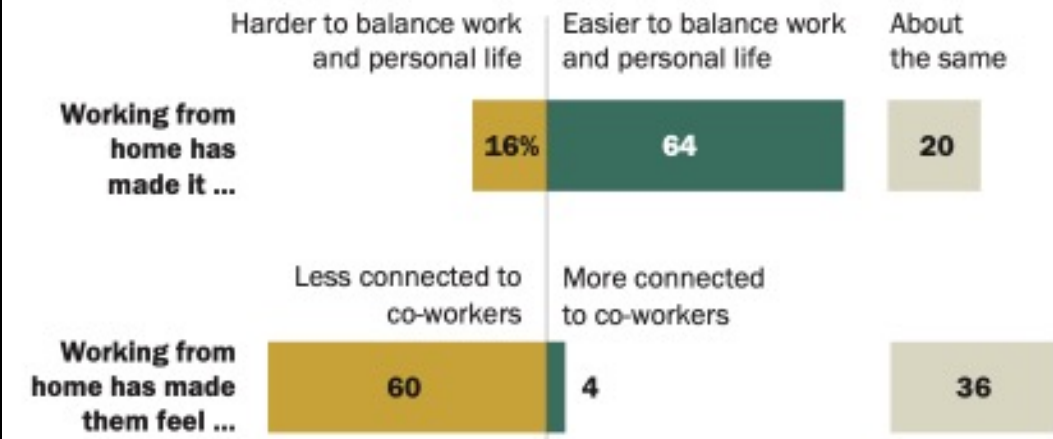
Why Some Employees Prefer to Work From Home



Productivity v. Connectivity

For workers who've made the switch to teleworking, most have found more balance but less connection with co-workers

Among employed adults who rarely or never worked from home before COVID-19 and are working from home at least some of the time now, % saying ...



Note: Based on those who say, for the most part, the responsibilities of their job can be done from home. Share of respondents who didn't offer an answer not shown.

Source: Survey of U.S. adults conducted Jan. 24-30, 2022.

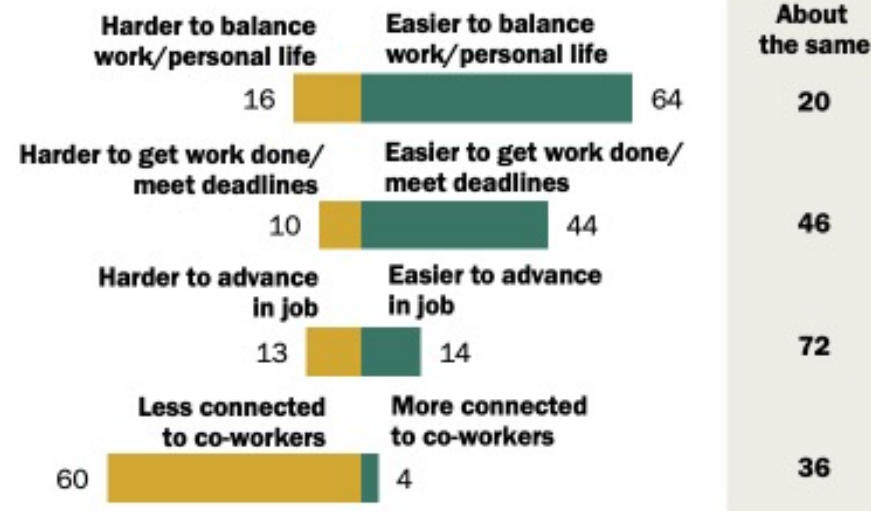
"COVID-19 Pandemic Continues To Reshape Work in America"

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Employee **Concerns** About Working From Home

Six-in-ten of those new to working from home say they feel less connected to their co-workers

Among employed adults who rarely or never worked from home before the coronavirus outbreak and currently work from home at least some of the time, % saying working from home has made it ...



Note: Based on those who say that, for the most part, the responsibilities of their job can be done from home. Share of respondents who didn't offer an answer not shown.

Source: Survey of U.S. adults conducted Jan. 24-30, 2022.

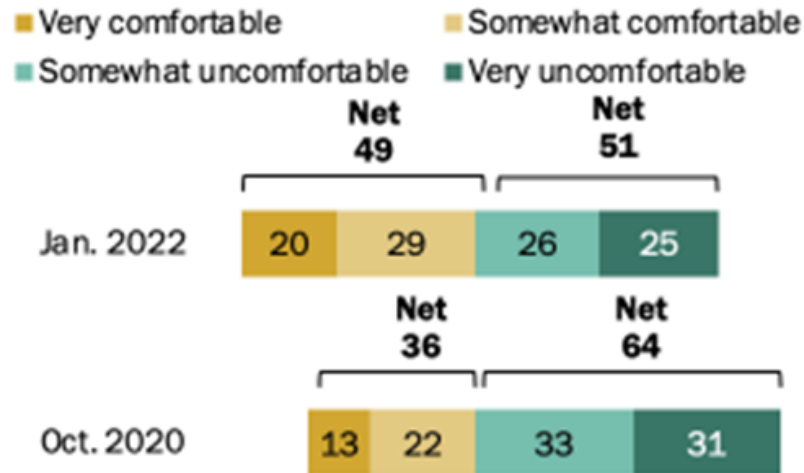
"COVID-19 Pandemic Continues To Reshape Work in America"

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Is It Time To **Return** To the Office?

About half of workers whose offices are closed say they'd feel comfortable returning in the next month

Among those who are working from home all or most of the time because their workplace is closed or unavailable to them, % saying they'd feel ___ working at their workplace if it reopened in the next month



Note: Share of respondents who didn't offer an answer not shown. Figures may not add to subtotals due to rounding.

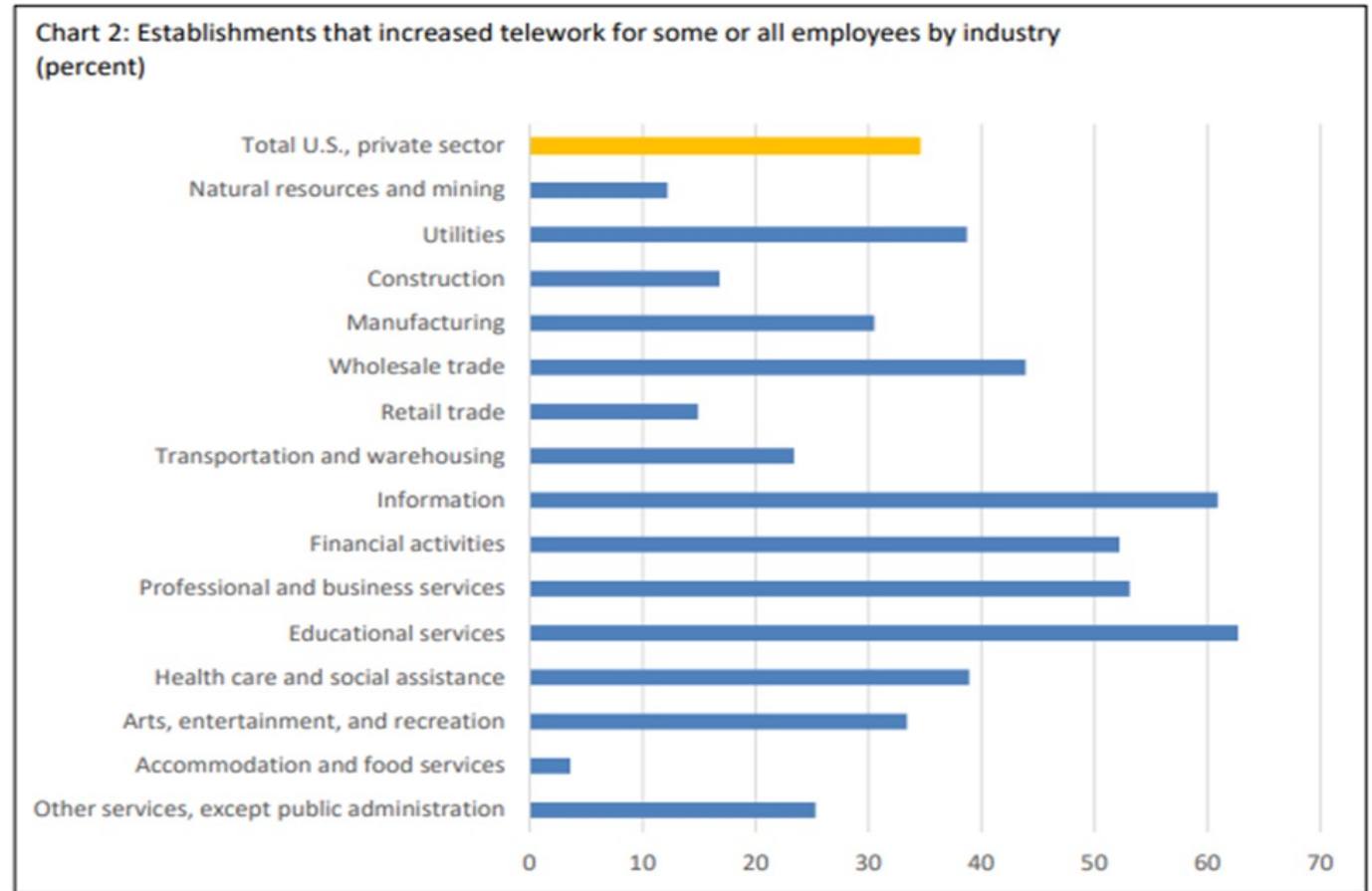
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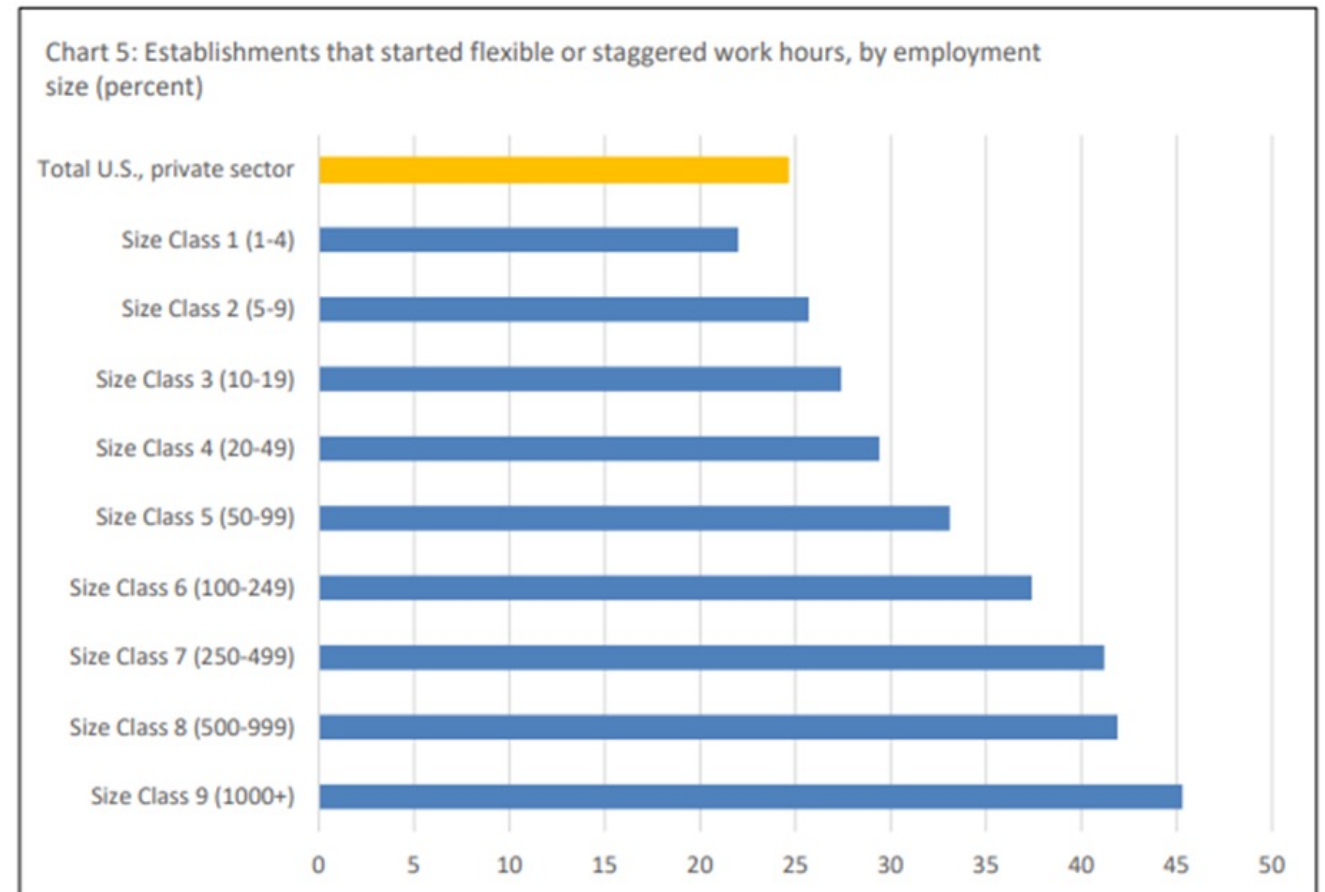
How are Employers **Responding?**

- According to *Forbes*, pre-pandemic, approximately 10% of the global workforce worked remotely. During the pandemic, that number climbed to over 50% -- and **85% of workers who worked remotely prefer to maintain that ability** (or at least choose to work remotely if desired).
- Chart: USDOL, Bureau of Labor Statistics



Increase in Flexible or Staggered Work Hours

- As a result of the pandemic, **33.9%** of all private-sector employment started to offer flexible or staggered work hours to employees.
- Chart: USDOL, Bureau of Labor Statistics



Best Practices for Employee Retention

The “New Normal” Opens Up Possibilities

- Workplaces have changed – even as businesses fully re-open
- Employers should be looking at the current conditions and drawing upon the lessons learned
- Decisionmakers now understand that many jobs which “had” to be performed in the office – can be performed remotely
- Questions employers should be asking:
 - How can employers better manage virtual workforces?
 - How can employers improve employee productivity?
 - How can employers engage and improve employee retention?
 - How can employers improve employee work-life balance?

Redesign Current Programs and Consider New Programs for the New Workplace

- Employers are realizing they do not need to bring back everyone to the office – some positions have seen an increase in performance while working remotely
- **Engagement Programs** should be considered for the virtual or remote workforce
- **Recognition Programs** must be re-imagined to address the needs of the teleworker and to help with retention and recruitment of the teleworker
- **Recruitment Programs** must be addressed. The territory has expanded to the “world” – employers now can recruit talent without boundaries for many positions
- **Training Programs** need to be updated for the virtual workforce and there is more!

Best Practices: Productivity and Schedules

JOURNAL REPORTS: LEADERSHIP

Remote Work Is Here to Stay. Bosses Better Adjust.

Even when the pandemic ends, many employees will continue to work from home. Here's how managers can make sure those workers stay productive—without burning out.



Best Practices: Productivity and Schedules

- Is the fixed schedule a round peg in a square hole? Employers should understand that managing the “fixed schedule” may not be the best practice for productivity with the remote workplace
- **“Swiss Cheese” Schedule** - Have you measured when work is being done by your remote employees?
 - Many employers are finding that employees are performing work at different times of the day/night to deal with life’s hurdles – personal obligations, schooling from home, etc.
 - Some employers are finding employees are working more at night or taking longer breaks during the day or working more on the weekends
- Employers should evaluate when work is being performed, productivity, other metrics important to your company and determine what schedule works best for your virtual teams

Best Practices: Productivity and Schedules

Businessweek

New Rules Of Work

What Really Happens When Workers Are Given a Flexible Hybrid Schedule?

Who goes into the office and when largely depends on where employees fall on the org chart.



Illustration: Inkee Wang for Bloomberg Businessweek

By [Arianne Cohen](#)

December 30, 2021, 8:00 AM EST

Best Practices: Productivity and Schedules

According to Bloomberg Businessweek:

- When given a choice, employees prefer:
 - Two days a week:
 - Most rank-and-file office workers favor two days a week in the office
 - Some prefer to have those days back-to-back, but the majority separate the days
 - Three days a week:
 - The employees who prefer three days per week are predominantly managers, client-facing employees, and those with highly people-heavy jobs

Best Practices: Engagement Ideas

- **Gamification** has become popular to engage employees and increase employee participation and effectiveness
 - Introduce games and competitions to everyday or routine tasks
- **Podcasts** have become more popular to touch base with your employees, but they need to be produced to engage the employee
- **Empathy in Management:**
 - Some employers are training managers to be more empathetic in managing virtual workers
 - Managers are learning how to “validate” that the employee is being heard
 - The Wall Street Journal reported how the leaders at several employers were trained to have one-on-one employee sessions regarding work or a project but start the session with a few simple questions about the employee – not work. In the examples discussed, the managers asked such things like, “How are you doing”? In some cases, if they have a concern, they may follow-up with additional questions, “How are you really doing?”

Best Practices: Engagement Ideas

- **Promote employee health and wellness** and train manager on available company resources
- **Virtual Bulletins Board, Hangouts and Meetings**
 - Select a topic each week for employees to post about.
 - Create virtual hangouts or meetings to allow employees to communicate
- **Replace in-person events with virtual events**
 - Make sure content is appropriate
 - There is a growing industry producing different types of virtual events for employee engagement
- **Effective leadership** means knowing your employees
 - Train managers how to get to know their teams in a virtual workplace beyond just the work
 - Develop a professional but also individual understanding of each employee

Best Practices: Engagement Ideas

- **Human Resources should also evolve for the virtual workplace.** HR should not wait for employees to visit, instead, it can:
 - Conduct virtual visits and “rounding” with employees
 - Host events for employees and their families about insurance, benefits, EAP, etc. – employees and their family should understand the “hidden paycheck” of what the company offers
 - Schedule weekly/monthly virtual open houses – set up an open, virtual meeting employees can call into

Best Practices: Recognition Ideas

- **Some Good News.** Taking a lead from an Instagram sensation, “Some Good News,” during the pandemic, some employers rolled out a weekly update or communication specifically highlighting small, medium and large successes and other good news at the company. The focus was to foster a positive culture during a difficult time, but there is no reason why this should not continue in the future.
- **New Weekly or Monthly Awards.** Employers are creating new small reward programs which recognize or acknowledge the “new normal.” For example, one company developed a weekly recognition program for virtual workers which highlighted remote worker’s success.
- **Employees Recognizing their Peers.** Many employers have found success in developing different peer recognition programs which reward the employee doing the nominating and the employee receiving the recognition. These can be fun and informal. They also develop team building and help break down silos.
- **Old School is New School.** Some employers have brought back hand-written “thank you” notes from executives and managers. With employees working remotely and with the ever-changing quarantine rules, the trip to the mailbox may be their biggest event in their day so receiving a hand-written thank you from their boss is a real game changer.
- **Develop programs which include the whole house/apartment – not just the employee.** Employers have developed contests and challenges for the whole family to participate in, not just the employee, since the employee is at home so much more. This allows the employer to recognize the whole house/apartment.

Best Practices: Evolution Leads to Inclusion

- Employers should also be aware that the evolution of the virtual workplace has opened the door to many different populations leading to more inclusion.
- **More experienced employees:** One of the fastest growing sectors of the workforce. With the possibility of teleworking, employers should focus on how to capture the benefits of more experienced workers like their institutional knowledge (current employees), subject matter/industry knowledge, dependability, and possible source for mentoring younger and newer employees
- **Employees with a Disability:** How employers conduct the interactive process with disabled employees and considering reasonable accommodations has changed!
 - Decision makers need to understand that more positions likely are available for disabled workers since the location of where work is performed as an essential function should be re-imagined.
- **Single parent families** can also benefit from the new normal with more flexible workplace schedules and virtual work
- **International Recruitment?** The virtual workplace permits recruitment to a broader employee/applicant population

Legal Pitfalls to Navigate in the “Great Resignation”

Pay Inequity

Employees talk about their pay. **They do.**



What are they **Talking About?**



Pay Gap

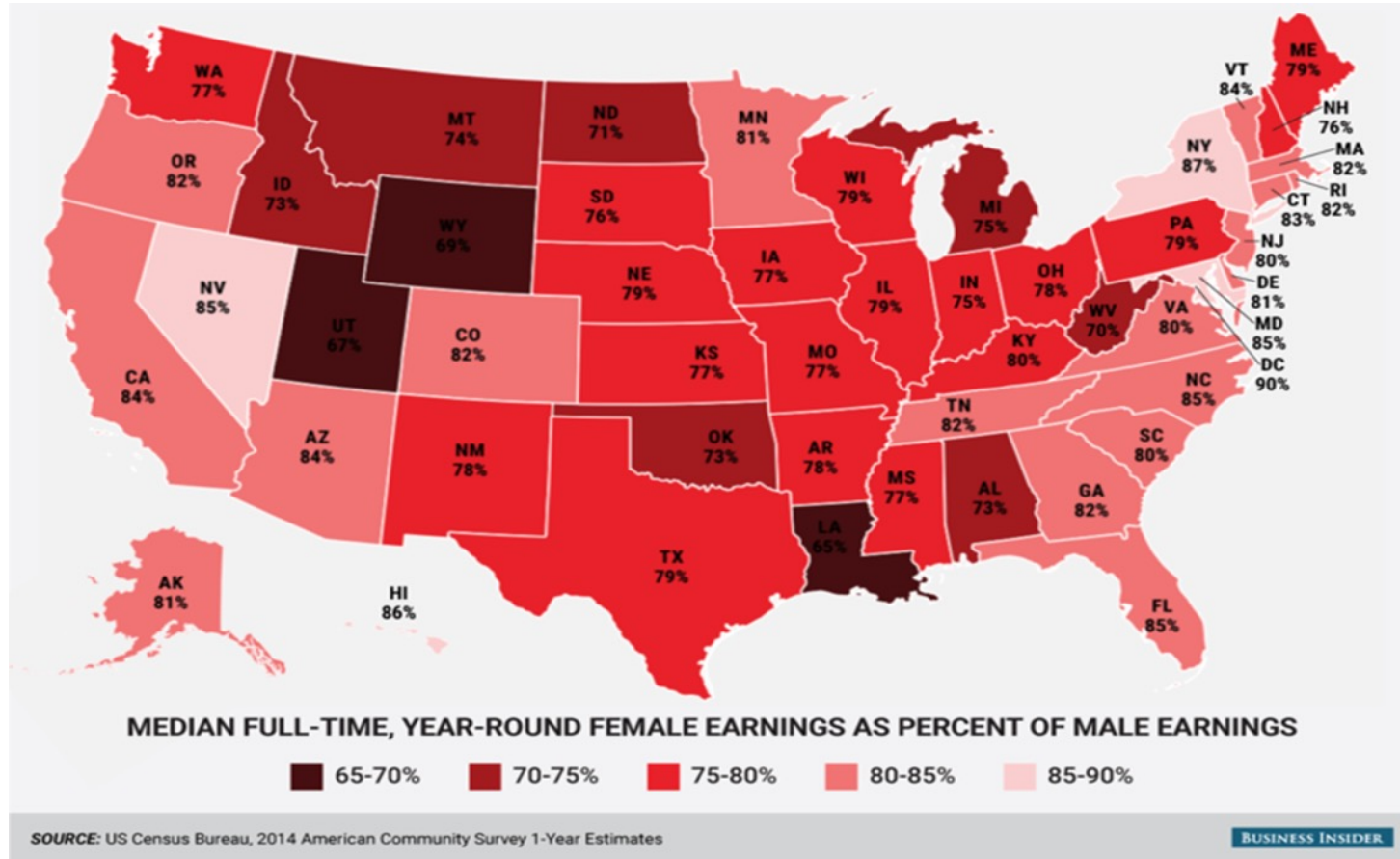
Pay differences in gender and race groups among all jobs



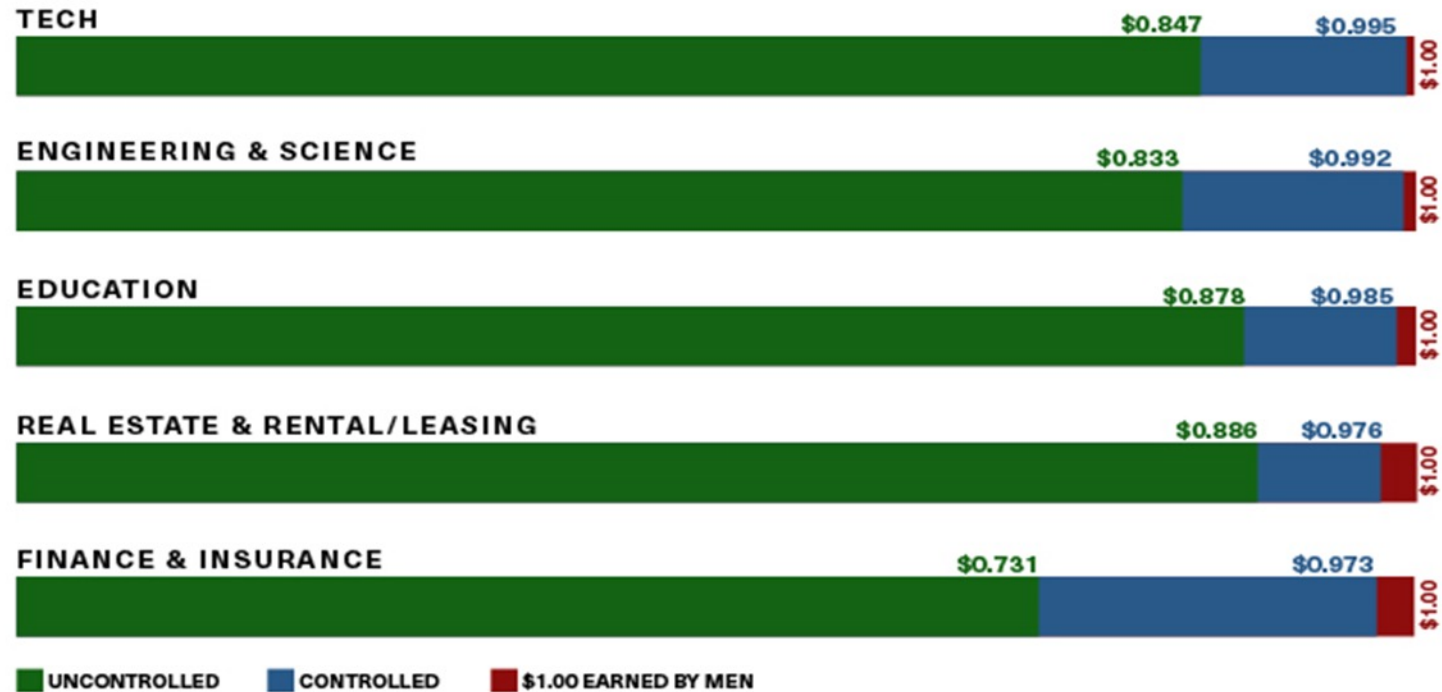
Pay Equity

Equitable pay for individuals in similar positions

Gender Pay Gap



Gender Pay Gap By Industry



Uncontrolled reflects the pay gap per industry overall, while controlled accounts for similar job titles.

SOURCE: PayScale



Great Resignation Has Increased These Concerns

- In this historic market, employers are paying more than ever to obtain or retain valued talent. As a result, there is a greater chance for pay inequities across an organization.
- Particularly true where organizations allow for managers to control offers/raises for their teams.



Pay Equity **Internal Assessments**

- Develop “pay groups” that mirror the company’s pay systems
 - Evaluate whether broader groups should also be reviewed
- Use statistical analyses and cohort reviews to identify actionable “pay disparities”
- Evaluate pay groups with “flags”
 - Are the gender/race-based pay differences justified?
 - Do we have the data/records necessary to demonstrate explanations for gaps?
 - What caused the pay disparity? Do we have defensible practices?
- Consider pay adjustments and/or practice changes

Remember **Defenses** Available to Employers

- General examples include:
 - Seniority system
 - Merit increase system
 - System that measures earnings by quantity or quality of production
 - Geographic location where a job is performed
 - Jobs that require the regular performance of different duties or services
 - Work that is performed on different shifts
 - Travel, if the travel is a regular and necessary condition of the particular job

Union Avoidance Strategies

The NLRA and Protected Concerted Activity

- National Labor Relations Act - Section 7
- “Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection”



The NLRA and Protected Concerted Activity

- NLRA protects concerted activity by employees.
- Applies equally to both unionized and union-free workplaces.
- Protected concerted activity: Typically, 2 or more employees acting together to attempt to improve their terms and conditions of employment.
- Employees are protected against retaliation for discussing or complaining about terms and conditions of employment.
- Includes social media posts!

Union Activity Has **Increased** Over the Last 2 Years

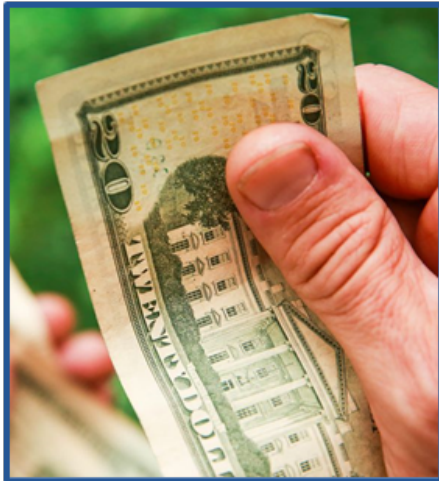
- In what has been described as a “burst of worker militancy,” employees have been emboldened by a tight labor market and the impacts of the pandemic to organize.
- Strikes:
 - John Deere – 10,000 employees
 - Kellogg's – 1,400 employees
 - Kaiser Permanente – 30,000 employees
 - Starbucks

Union Activity Has **Increased** Over the Last 2 Years

- Employee complaints or protests regarding:
 - Heat, Cold
 - Safety
 - Sexual harassment & discrimination
 - Wages and benefits
 - “Treatment” by management
 - Rules or policy enforcement
 - Job posting and bidding
 - Overtime work scheduling
 - Vending machines, break room, plant conditions in general

The **Easy Stuff** Makes a Huge Difference!

The **cause** of union activity dictates the success of an organizing drive. Statistically, if **money** is the main issue, unions will win only 35% of the time. If **fairness** or **respect** are the issues, unions will win 69% of the time!



35% Money



69% Fairness or Respect

A Reminder About the **Unionization Process**

- Secret ballot election.
 - Union gets at least 30% of signed authorization cards.
 - Petitions NLRB for election.
 - Majority of those who vote.
- Voluntary Recognition.
 - Employer acknowledges majority of union authorization cards have been signed (“card check”). 50% + 1.
 - Could be unintentional.
 - Don’t handle the cards, petitions, etc.

Outcome of the Election

- Determined by the majority of those employees who vote. Can vote *No* even if signed a card.
- Doesn't matter how many eligible voters there are.
- If the Union wins, it represents all employees in the bargaining unit including those who did not vote, those who voted *No* and those who never join and the Union is exclusive spokesperson for employees.

Best Practices: Responding to Union Organizing

- Take steps toward maintaining a union-free status from the very beginning of their relationship with employees; should communicate clearly that there is no need for a union. Concerns and communications should be received under an open-door philosophy.
- It is beneficial to show employees that the company is pro-worker as opposed to being anti-union. If employees feel that they have a voice at work, they are unlikely to look to an outsider (*i.e.*, union) to provide them with one.
- Supervisors and managers should have an open-door policy in order that employees feel comfortable in raising issues or concerns without fear of retaliation.

Best Practices: Responding to Union Organizing

- Set up a program or practice of interactive communication such as suggestion boxes, or a designated time to speak during company meetings.
- Provide an explanation for unpopular decisions. A very basic response can reiterate the employers understanding that employees want to be involved.
- Do not wait until the threat or rumor of a union before it implements practices such as a grievance procedure or conducting employee opinion surveys. Consider having these practices in place as a means to leave the union less leverage and little room to identify legitimate concerns.

Restrictive Covenants

How do you **protect** your assets?

- Restrictive Covenant Agreements:
 - Non-Competition – Key employees
 - Non-Solicitation – Key employees
 - Non-Disclosure – All employees?



Candidates for Restrictive Covenants



- Executives
- Key Management
- Sales/Marketing
- R&D
- Employees with specialized training
- Everyone
 - At least non-disclosure?

Enforcement of Non-Compete Agreements (NC)

- In North Carolina, contracts not to compete are required by statute to be in writing and signed by the employee.
- North Carolina courts have determined that restrictive covenants are enforceable if the terms are reasonable and necessary to protect certain legitimate business interests of the employer.
- Factors considered when determining reasonableness include the hardship an agreement puts on the former employee and the restrictions placed on time, territory and activity of the former employee.

Defend **Trade Secrets** Act Notice

- The DTSA requires employers provide notice of its immunity and retaliation provisions to employees, consultants, and independent contractors in any agreement entered after May 11, 2016, that governs the use of trade secrets or other confidential information, including:
 - Employment agreements
 - IC agreements
 - Consulting agreements
 - Separation and release of claims agreements
 - Severance agreements
 - Non-compete and non-solicitation agreements
 - Confidentiality agreements and proprietary rights agreements

DTSA Notice Language for Agreements

- Pursuant to the Defend Trade Secrets Act of 2016, I understand that:
 - An individual may not be held criminally or civilly liable under any federal or state trade secret law for the disclosure of a trade secret that: (a) is made (i) in confidence to a federal, state, or local government official, either directly or indirectly, or to an attorney; and (ii) solely for the purposes of reporting or investigating a suspected violation of law; or (b) is made in a complaint or other document that is filed under seal in a lawsuit or other proceeding
 - Further, an individual who files a lawsuit for retaliation by an employer for reporting a suspected violation of law may disclose the employer's trade secrets to the attorney and use the trade secret information in the court proceeding if the individual (a) files any document containing the trade secret under seal; and (b) does not disclose the trade secret, except pursuant to court order.

What is a **Trade Secret**?

Information (in any form)

1. That derives independent economic value;
2. From not being generally known;
3. Or readily ascertainable;
4. By proper means;
5. From persons who can obtain economic value from it; and
- 6. Is the subject of reasonable efforts to maintain its secrecy**

Examples: formula, pattern, compilation, program, device, method, technique, product, system, process, design, prototype, procedure, code, etc.

Protecting Confidential Information

- Not all confidential information is a trade secret but may still need protection.
- Require employees to sign confidentiality agreement
- Severance agreements should include protective language if no prior agreement



Protecting Confidential Information

- Implement policies regarding access and use of confidential information – and limit access where appropriate
- Implement policies limiting third-party access
- Audit personnel files to ensure that you have fully executed original copies of key documents
- Mark important documents “confidential”



Protecting Yourself from Claims by Others

- Ask New Hires for All Restrictive Covenant Agreements entered into with prior employer
 - Determine circumstances under which new hired executed agreements
 - Determine reason(s) why new hire is looking to leave employment
- If you require employees to sign agreements, communicate that you intend to honor the lawful provisions of employee agreements with prior employers
- If a new hire says no agreements were entered into with the prior employer, secure written confirmation of the same

Protecting Yourself from Claims by **Others**



- **New hires should come empty-handed and be explicitly informed (in writing):**
 - Do not download, copy, or email confidential information;
 - Return any confidential information stored on personal device or at home;
 - When leaving, they should take only purely personal items and not company records of any kind;
 - Have personal information stores on their former employer's electronic devices extracted by former employer only; and
 - Be honest when asked about their new employment.

Protecting Yourself: Exit Protocols

- Find out from the employee:
 - When leaving?
 - Why leaving?
 - Where going?
 - New position's duties
- Delete terminating employee's access to computers and confidential information
- Discuss confidential information obligations
- Discuss the employee's contractual obligations
- Give employee copies of applicable agreements
- Make sure **all** company property is returned

Questions?



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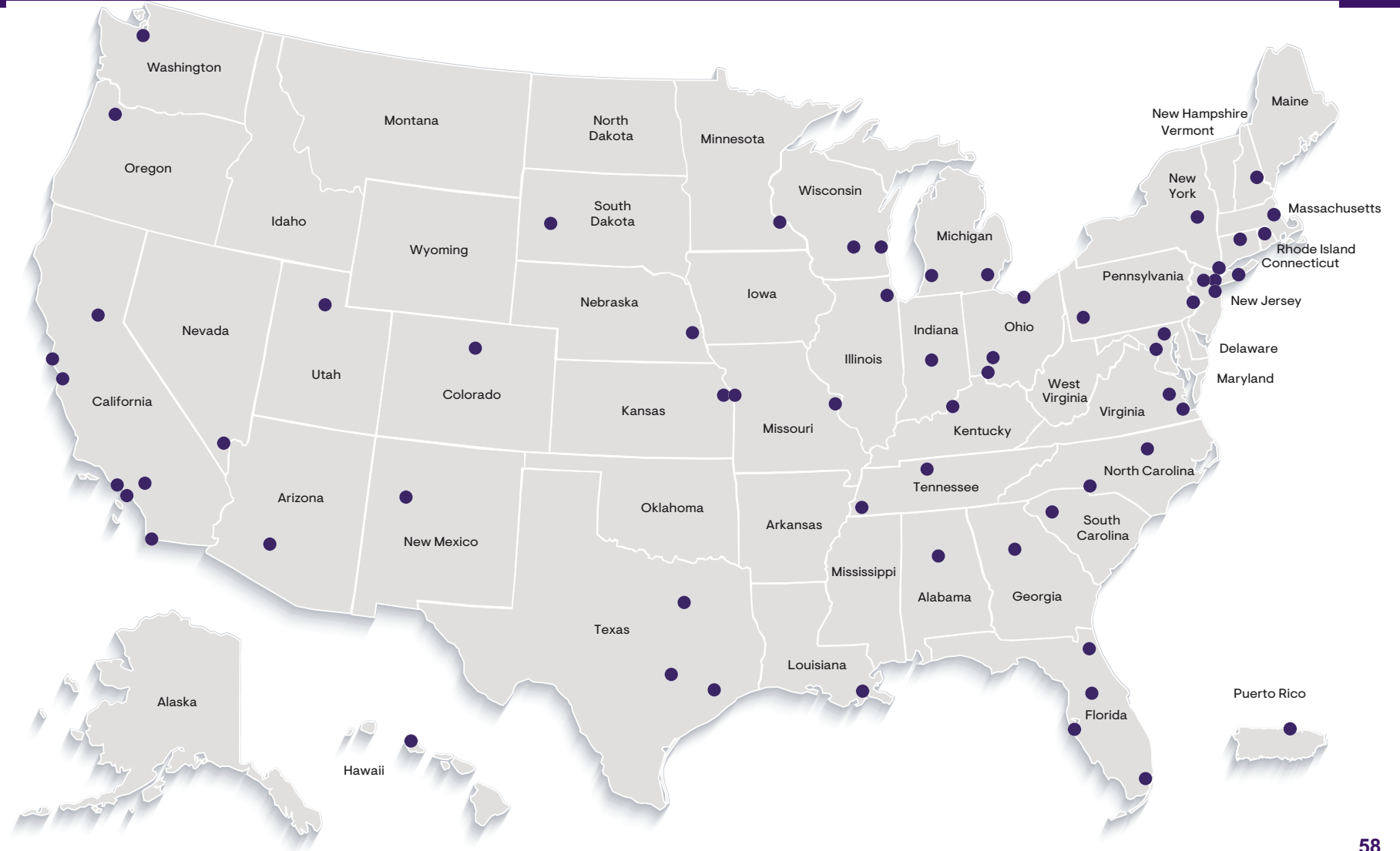
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63

Locations Nationwide

950+

Attorneys



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Thank **you.**