

Top 5 Employment Law Tips for a Successful 2023

February 10, 2023



Littler

ACC Association of
Corporate Counsel
SOUTH CAROLINA

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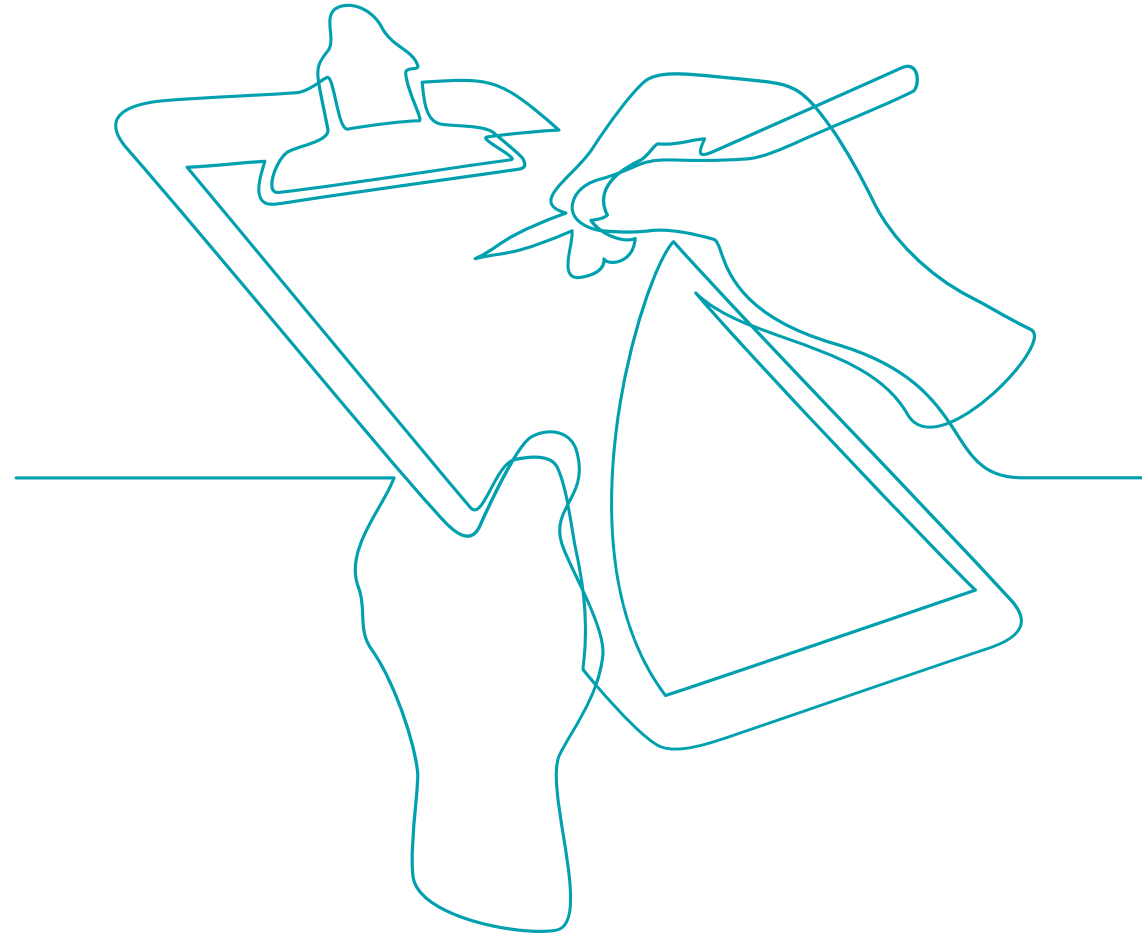
GRANT BURNS

General Counsel

AFL

Agenda

- The Remote Worker
- Quiet Quitting
- AI Tools in Human Resource Decisions
- IE&D Hot Topics
- Top Compliance and Litigation Plays to Protect Your Company





Managing the Legal Implications for Remote Employees



The Great Return: Companies Are Calling Their Workers Back to the Office as COVID-19 Fades

Businesses are showing flexibility in bringing employees back to the office as they deal with an extraordinarily tight job market.

By [Tim Smart](#) | March 4, 2022, at 12:58 p.m.

The New York Times

A Two-Year, 50-Million-Person Experiment in Changing How We Work

The office was never one size fits all. It was one size fits some, with the expectation that everybody else would squeeze in.

COMMENTARY • GREAT RESIGNATION

Offices are obsolete—and so are the managers who insist you must go back

BY [KEITH FERRAZZI](#) AND [KIAN GOHAR](#)
March 3, 2022 1:34 PM EST

FORTUNE

CAREERS

Get Ready For The Return-To-Office Showdown

[Jack Kelly](#) Senior Contributor @
I write actionable interview, career and salary advice.

Forbes

SUCCESS • RETURN TO WORK

Fed-up managers declare WFH is over, as 77% say they'd fire you or cut your pay for not coming back to the office

BY [MEGAN LEONHARDT](#)
April 7, 2022 11:31 AM CDT

San Francisco Examiner

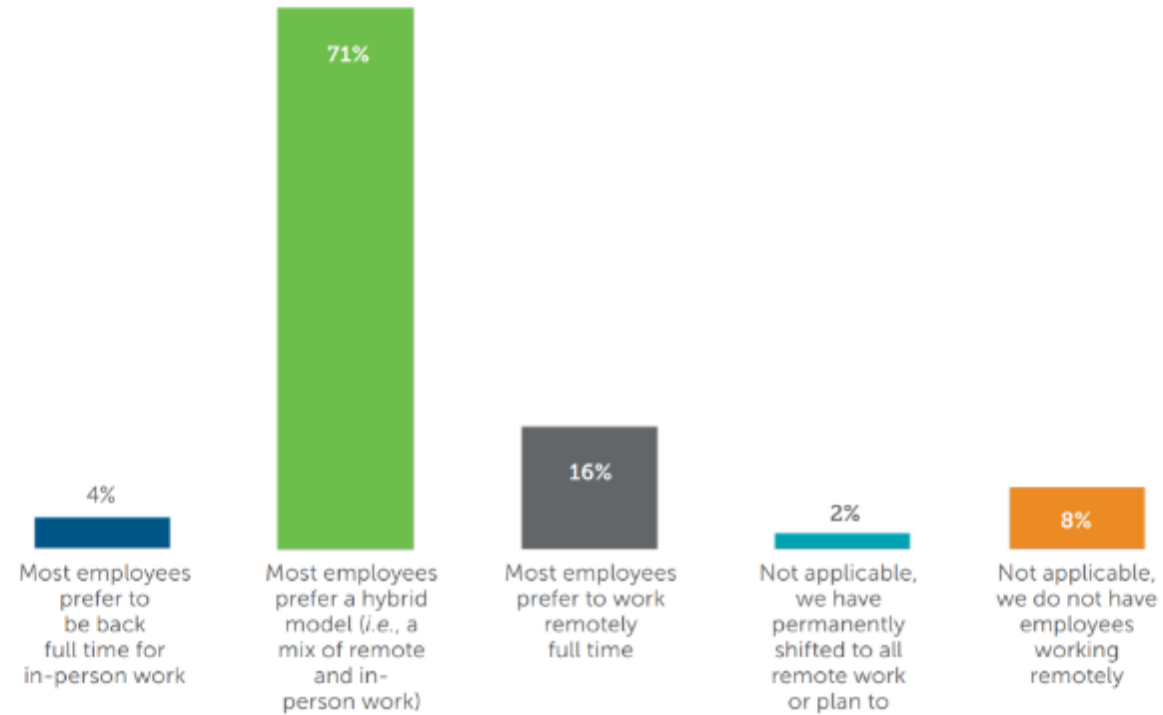


FORTUNE

RETURN,
RESIGN,
OR RETHINK

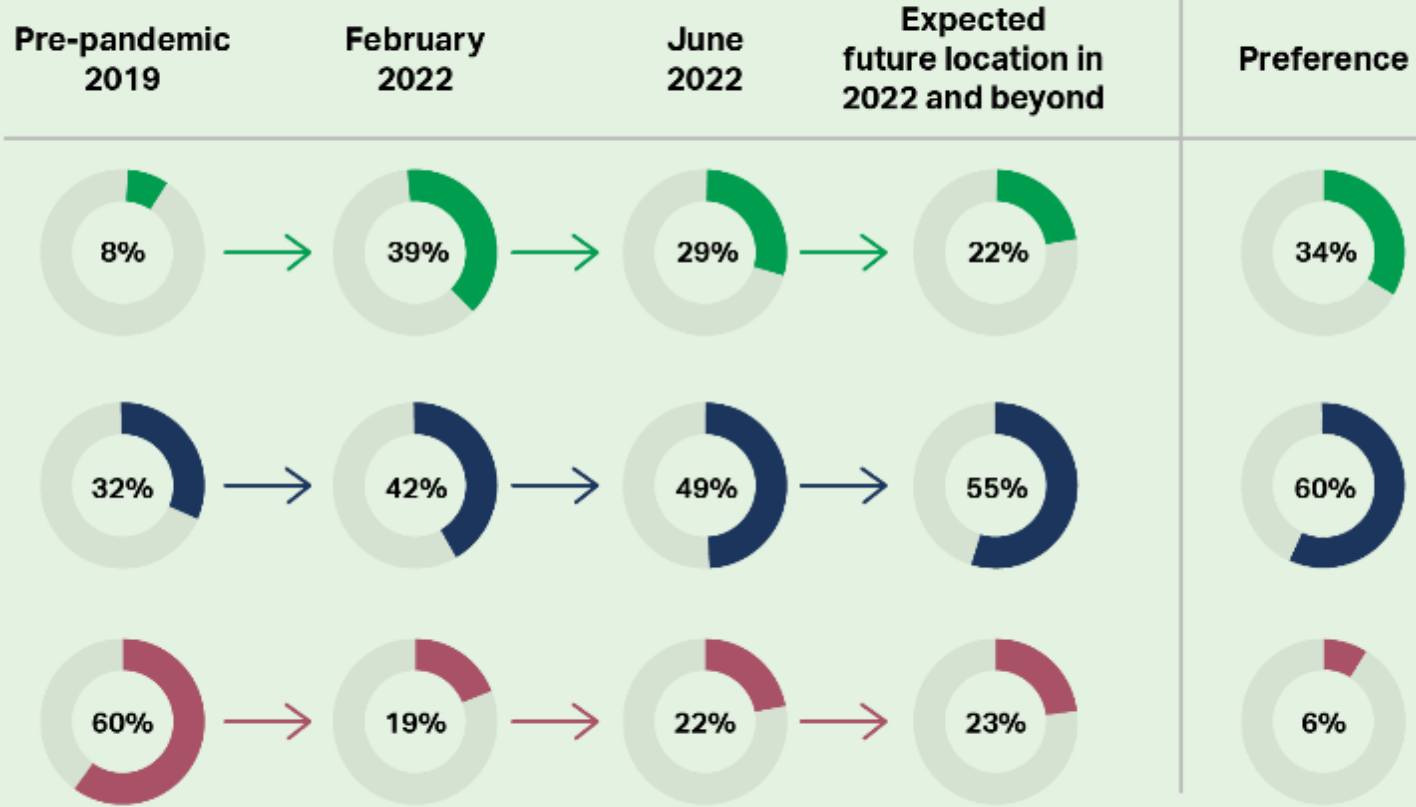
Return to the Physical Workplace/Remote Work

For your employees who can work remotely, to the best of your knowledge, which of the following most accurately describes their preference for a return to in-person work as it becomes safer to do so?



Past, Current, Anticipated, and Preferred Employee Work Locations for Remote-Capable Jobs

■ Exclusively remote
 ■ Hybrid (≥10% to <100% remote)
 ■ On-site



GALLUP

Employee Expectations in the Post-Pandemic Workplace



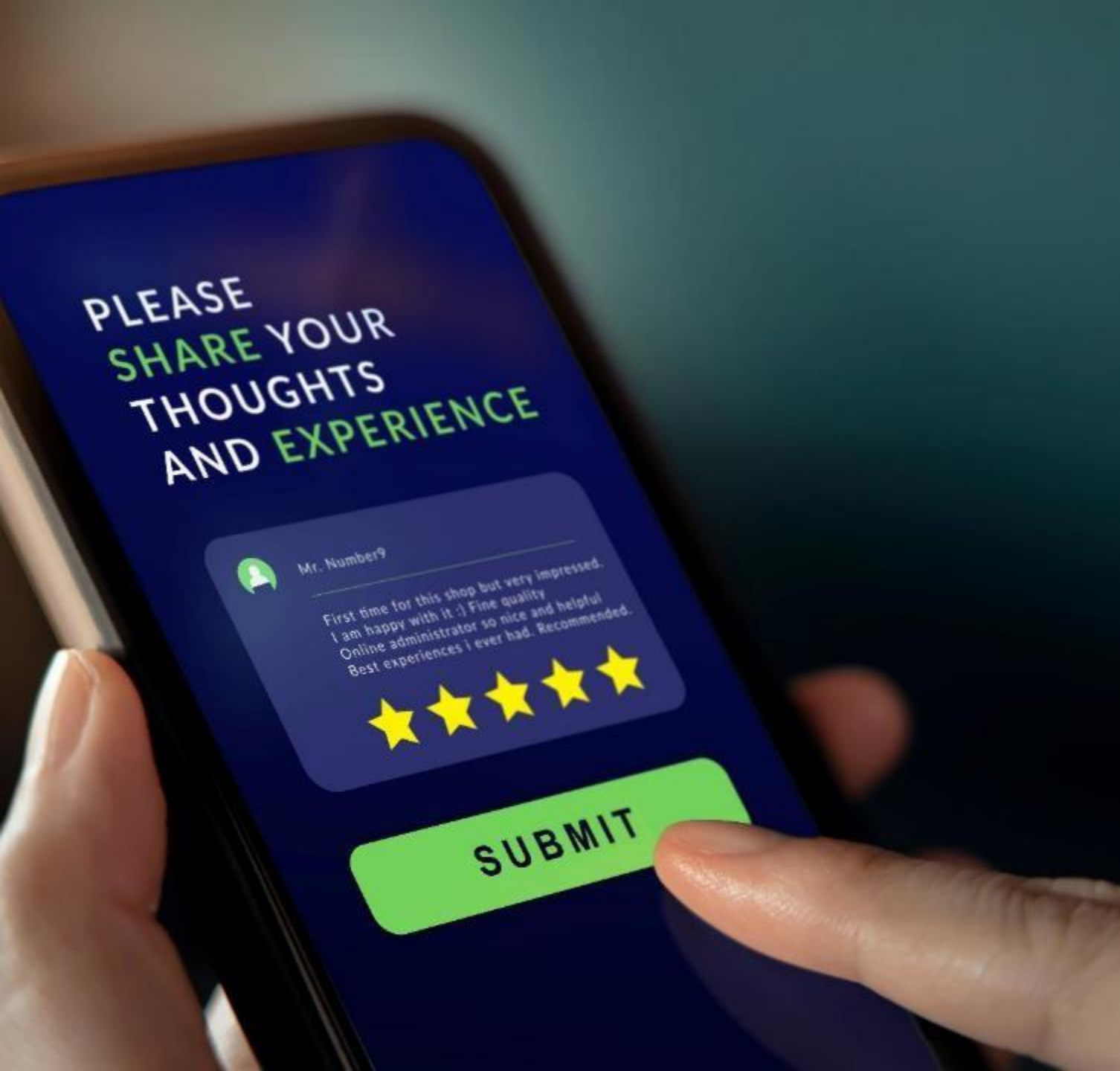
An astonishing 14 million to 23 million Americans intend to relocate to a different city or region as a result of telework.”

Adeyo Akala, NPR

Embracing the “Wandering Worker”

- “Ocean views and unreliable Wi-Fi: What it’s like to work from a transatlantic cruise?”
- “Royal Caribbean's new partnership with SpaceX's Starlink opens possibility to work remotely on cruise ships”
- “Princess Cruises wants remote workers to live on its tech-enabled ships”





Survey Time!

Survey Question #1

Is your organization continuing to allow employees to work remotely?

Survey Question #2

Have any of your remote workers relocated to new jurisdictions where you did not previously have business operations?

Survey Question #3

Have any of your remote workers relocated to new locations outside of the United States, or do you anticipate any of them doing so?

Embracing Remote Work and Wandering Workers

- Employees can, and do, work anywhere
- Employers can, and do, recruit everywhere to meet their business needs
- Does flexibility mean increased legal risk?
 - YES, unless properly managed



Dealing With Remote Work: (Some Of) The Issues

- Tax Withholding & Payroll Mandates
- Unemployment Insurance
- Workers' Compensation
- Wage and Hour Laws
- Training
- Leave and Benefits
- Information/Data Privacy & Security



Where Are Your Employees?

- Each state has different laws applicable to all aspects of employment, such as wage and hour, paid sick leave, vacation accrual, harassment & discrimination
- Many states, and municipalities, have enacted their own minimum wage laws
- Employees may be entitled to the benefits of certain laws even if the employer does not operate in that state
- Relocations can even occur overseas or (aghast!) to California

Have an Issues Checklist

- Build and maintain your own checklist:
 - State/local/international business licensing & registration
 - Required notices to employees in the state or municipality, including “workplace” posters
 - Payroll tax withholding
 - Unemployment insurance
 - Workers’ compensation
 - Equal employment laws
 - Accommodations, leaves of absence, and paid sick leave
 - Wage and hour (Including exemption status, min. wage, meal/rest breaks, pay frequency, pay deductions/changes, expense reimbursements)
 - Equal pay requirements
 - Training requirements
 - WARN Act
 - Enforceability of restrictive covenants
 - Privacy/data security requirements

What Do We Do?

- Reissue requests to employees to update their working location
- If you have employees who have wandered, determine if there are any issues (*e.g.*, tax issues, license issues, differences in state or municipality employment laws)
- Roll out new teleworking agreement/policy
 - This policy should include clause that requires the employee to disclose any change in work location
 - It should also state that the current work location is the only approved location

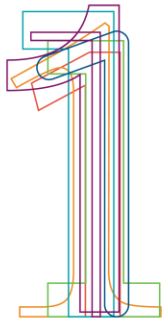


Handling Accommodation Requests for Remote Work

- Key questions to consider:
 - Is in-person work essential—really?
 - What operational hardships are created by employees working from home?
 - Be prepared to explain why remote work during the pandemic was not optimal
 - Technological issues?
 - Decreased productivity, performance issues?
 - Effects on teamwork, creativity?
 - Can you prove it?



Engage in the Interactive Process



Learn the facts

What are the job functions; what are we allowing others to do?

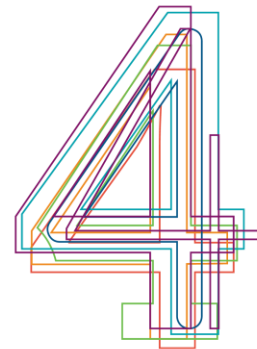


Get medical documentation

Learn what employee can/can't do by engaging in the interactive process



Is there a hardship?



Document

Remote Work Toolkit for Employers

- Guide, Model Policy and Model Agreement for companies to use when implementing remote work in the pandemic and post pandemic era
- To learn more or purchase Remote Work Toolkit, email innovation@Littler.com
- Purchase online for instant access: littler.com/buy-rw-toolkit





Quiet Quitting: How to Prevent Employees From Quiet Quitting

What Is “Quiet Quitting” and Why Did It Develop?

- Most traditional scenario:
 - Employees self-limit their obligations at work to only their core job duties and avoid work beyond or outside of their job descriptions
 - This may not be the only scenario!
- The Great Resignation
 - Significant resignations in 2021 drove the demand for employees
 - Employees/applicants had a lot of leverage in 2021 and 2022
 - This cultivated an environment where employees could quietly quit their existing positions for better opportunities

Overemployed

Work Two Remote Jobs. Reach Financial Freedom

[My Story](#) ▾ [Multiple Remote Jobs](#) ▾ [Money Matters](#) ▾ [Success Stories](#) [Resources](#) ▾ [Join The Community](#) ▾

Welcome To The Secret Door To Financial Freedom

Overemployed is a community of professionals looking to work two remote jobs, earn extra income, and achieve financial freedom. Be free from office politics and layoffs. Instead, improve your mental health and negotiate a severance. [Join us.](#)

Latest Articles



Story: Living Paycheck To Paycheck To Making Over Six Figures with 'OE'

February 1, 2023 | [Chloe T.](#) | [Leave a comment](#)

Tired of living paycheck to paycheck and sleeping on an air mattress? Time to get 'OE' and do something about it. [...]

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Other Examples of “Quiet Quitting”

- “Career polygamy” and “overemployment” are on the rise
- Remote workers often use technology to assist in juggling responsibilities for multiple jobs
 - Mouse jiggers
 - Multiple computers/devices
 - Meeting DJ’s



U.S. Surgeon General - Dr. Vivek Murthy Releases Framework For Workplace Mental Health and Well-Being

U.S. Department of Health and Human Services
Office of the U.S. Surgeon General

Current Priorities of the U.S. Surgeon General

Priority Areas ▾ House Calls Podcast ▾

Our Priorities > Workplace Well-Being > Resources

Workplace Well-Being Resources

Explore resources for Workplace Mental Health and Well-Being

- Reflection Questions
- Practice Examples
- Protection from Harm
- Connection & Community
- Work-Life Harmony
- Mattering at Work
- Opportunities for Growth

Read The Surgeon General's Framework for Workplace Mental Health and Well-Being to learn more about the Five Essentials of workplace mental health and well-being — a foundation that workplaces of any size, across any industry, can build upon.



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[Workplace Mental Health & Well-Being — Current Priorities of the U.S. Surgeon General \(hhs.gov\)](https://www.hhs.gov/workplace-well-being)

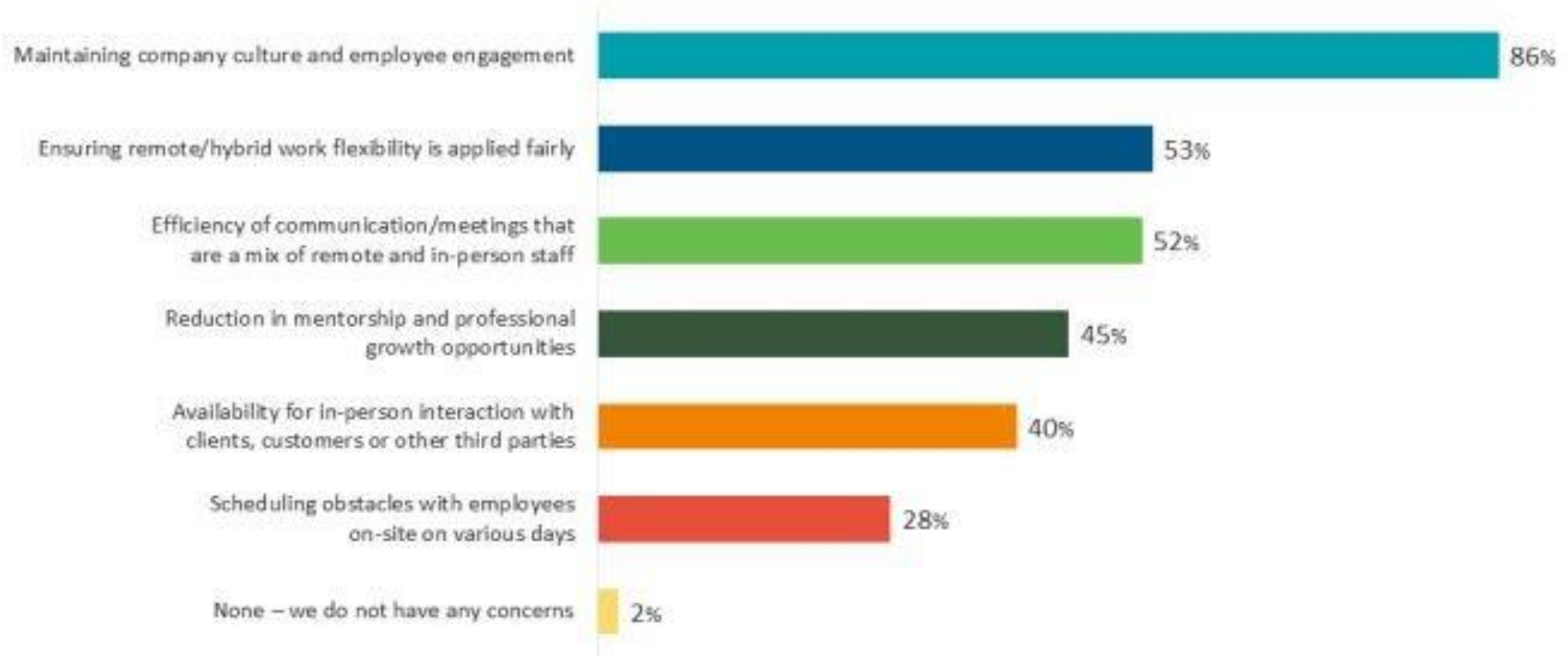
Five Essentials for Workplace Mental Health and Well-Being

- Protecting employees from harm
 - Create conditions for physical and psychological safety
- Connection and community
 - Foster positive social interactions and relationships in the workplace
- Work-life harmony
 - Promote practices that better assure work-life harmony
- Establishing value at work
 - Provide and encourage a culture where employees matter at work
- Providing opportunities for growth
 - Create opportunities for employees to accomplish goals and promote opportunities for growth

“How can we prevent *quiet quitting*?”

Which of the following represent concerns of your organization with regard to managing a hybrid work model? (Check all that apply)

This question was not asked to those whose organizations have shifted to permanent remote work or do not have employees working remotely.



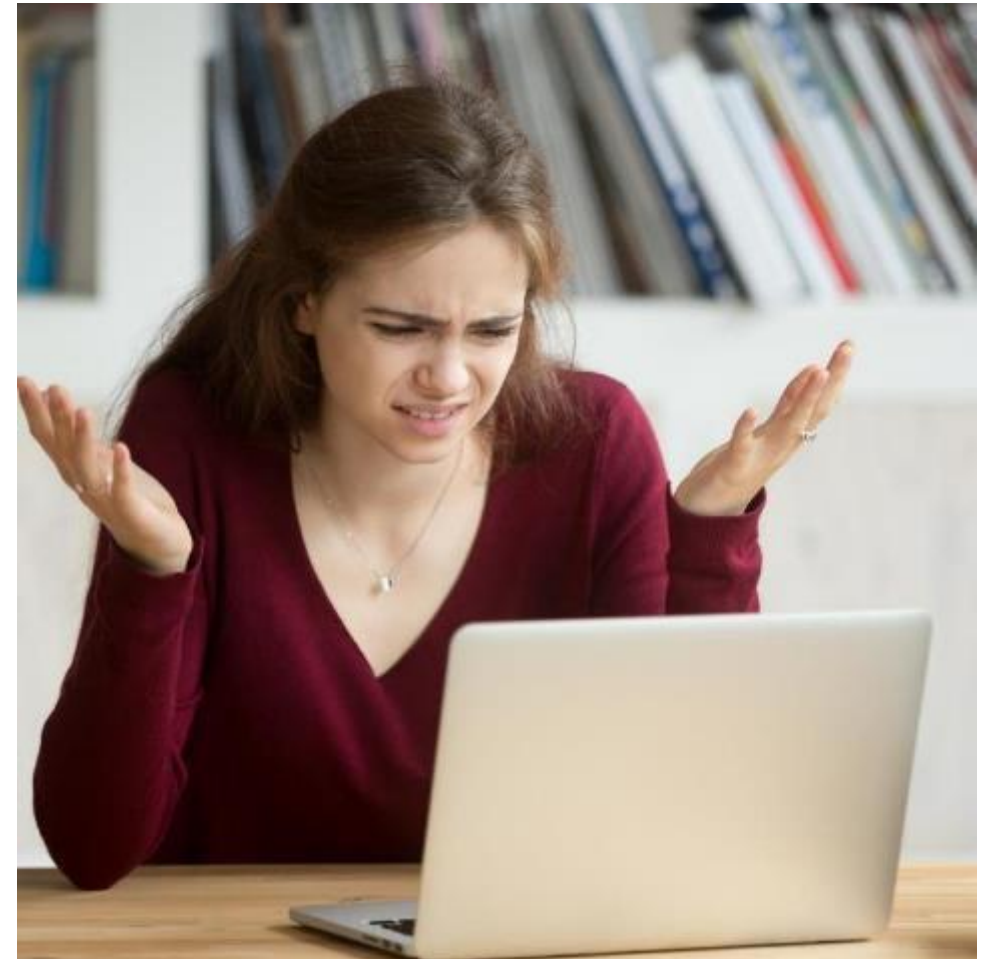
Connect, Invest, Trust

- Open door policies, regular meetings to discuss concerns
- Commit to learning about your employees' experiences, expectations, and goals
- Invest in mentoring, motivating, and quality supervision of employees
- Recognize value



Transparency

- Reassess expectations for employees
- Review and revise job descriptions, performance review criteria
- Communicate these changes and expectations
- Be mindful of potential disparate impact



Reward

- Consider incentives:
 - Adjusting bonuses
 - Incentives
 - Other benefits
 - Career opportunities
- Structure incentives to reward commitment and enthusiasm for the company

Monitor

- Productivity tracking
- Performance metrics
- Regular reviews
- Routine check-in calls
- Consider the privacy implications of these measures



Document and Enforce



- Consider updated moonlighting policies
 - Expressly prohibit vs. consent required
- Other policies to consider
 - Conflict of interest
 - Non-compete
 - Confidentiality agreements and privacy policies



AI Tools in Human Resources

AI and HR's New Digital Mandate

- No facet of HR remains untouched, and the potential is just emerging:
 - Online recruiting
 - AI-assisted interviewing
 - Machine learning predicting who will resign
 - Chatbots handling out-sick notices
 - Smart redesign algorithms evaluating performance and identifying employees for layoff
- The Promise: Cost savings, speed, quality and accuracy – all essential to remain competitive

Brief

HR's New Digital Mandate

Digital technologies have become essential for HR to engage top talent and add value to the business.

By Michael Heric

October 10, 2018 • 12 min read



What Are These HR AI Systems...?

- Video interviewing and assessments
- Blind resumes
- Ensure all applicants are getting a “thank you for applying” email
- Utilizing chat bots to give candidates access to information they need at anytime
- Quickly getting open job information out on social media
- Having algorithms screen resumes for you

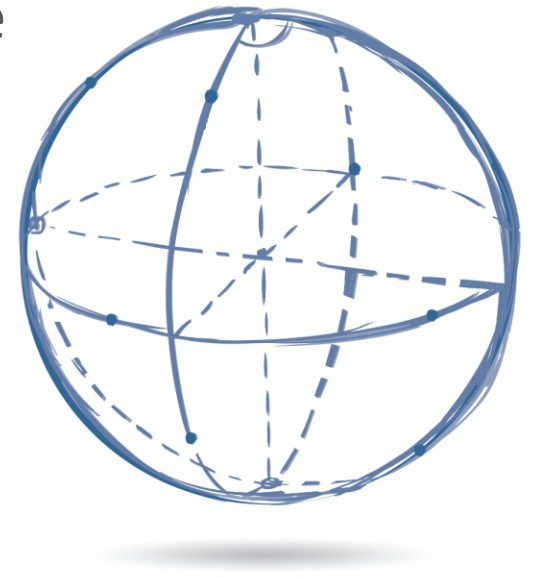


Risk: The Emergence of Algorithmic Bias and Biometric Class Actions

- AI-powered talent acquisition includes both recruiting and assessment
- Such systems are often described and viewed as more objective because of the technology. This can be true or misleading, and sometimes even false.
- AI uses algorithms which are created by humans and can reflect human biases - both intentionally and unintentionally created
- Using AI-powered HR systems requires awareness of the potential of algorithmic bias, which can include biases that are unlawful such as discriminating against talent on basis of protected categories such as age, sex, race, color, disabilities, religion, national origin, and several others, depending on applicable laws
- Intentional discrimination is possible, such as alleged age restriction on social media advertising

Benchmarking Legal Compliance for AI-Powered HR Systems

- Benchmarking legal compliance for AI-Powered HR systems
 - Vital role of in-house legal compliance attorney as part of the overall multi-disciplinary and diverse compliance team
 - Catalogue and understand existing laws and regulations regarding algorithmic intelligence, data, and privacy rights, including regulatory environment
 - Incorporate legal compliance review and documentation into all phases of development of ai-powered HR systems: design, building, implementation, and monitoring
 - Determine whether HR system includes automated AI decision making; if so, include human oversight and ability to change decisions





Inclusion, Equity and Diversity

Inclusion, Equity & Diversity Playbook

Littler | Inclusion, Equity & Diversity Playbook



Employers are under more pressure than ever to create inclusive, equitable, and diverse workplaces – and for good reason.

But as business, diversity and HR leaders endeavor to drive forward meaningful programs, they must remember that IE&D is also a legal compliance issue. From improper data collection and quotas to discrimination and differing jurisdictions, IE&D programs present significant risks alongside vital opportunities.

That's where Littler's IE&D Playbook comes in, providing employers with an interactive, comprehensive collection of resources – including videos, FAQs, podcasts, and high-level summaries – that can help them answer fundamental IE&D compliance questions, assess their current efforts, uncover gaps and challenges, and identify IE&D programming opportunities.

Here's how the Playbook can help your organization:

- **Cut through the confusion.** Explore a broad range of IE&D hot topics through resources, analysis, and recommended practices to efficiently fill this space and help conceptualize your unique IE&D plan. Organized into 12 key focus areas – including recruiting, retention, program development, global considerations, and assessing progress, among others – the Playbook offers an intuitive, easy-to-use knowledge base that meets your organization where it is on its IE&D journey.
- **Enable a more efficient planning process.** The Playbook is a free self-service tool that helps you find answers to central IE&D questions – so that when you do engage an attorney, you and your team will be better prepared to work with them.
- **Gain access to Littler's deep bench of attorneys.** The Playbook can directly connect you to Littler attorneys with subject matter knowledge in areas of interest to your organization. Users can also easily obtain a proposal that details how Littler professionals experienced with IE&D training, consulting, advice, and program development can help address your organization's specific IE&D needs.

Successful and sustainable IE&D strategies help fuel engagement and innovation, attract and retain talent, and improve an organization's public profile. The IE&D Playbook can help you get started or expand your company's programming – all while navigating myriad potential legal and practical issues.

To be granted access to the Littler IE&D Playbook, scan the QR code and complete this form.

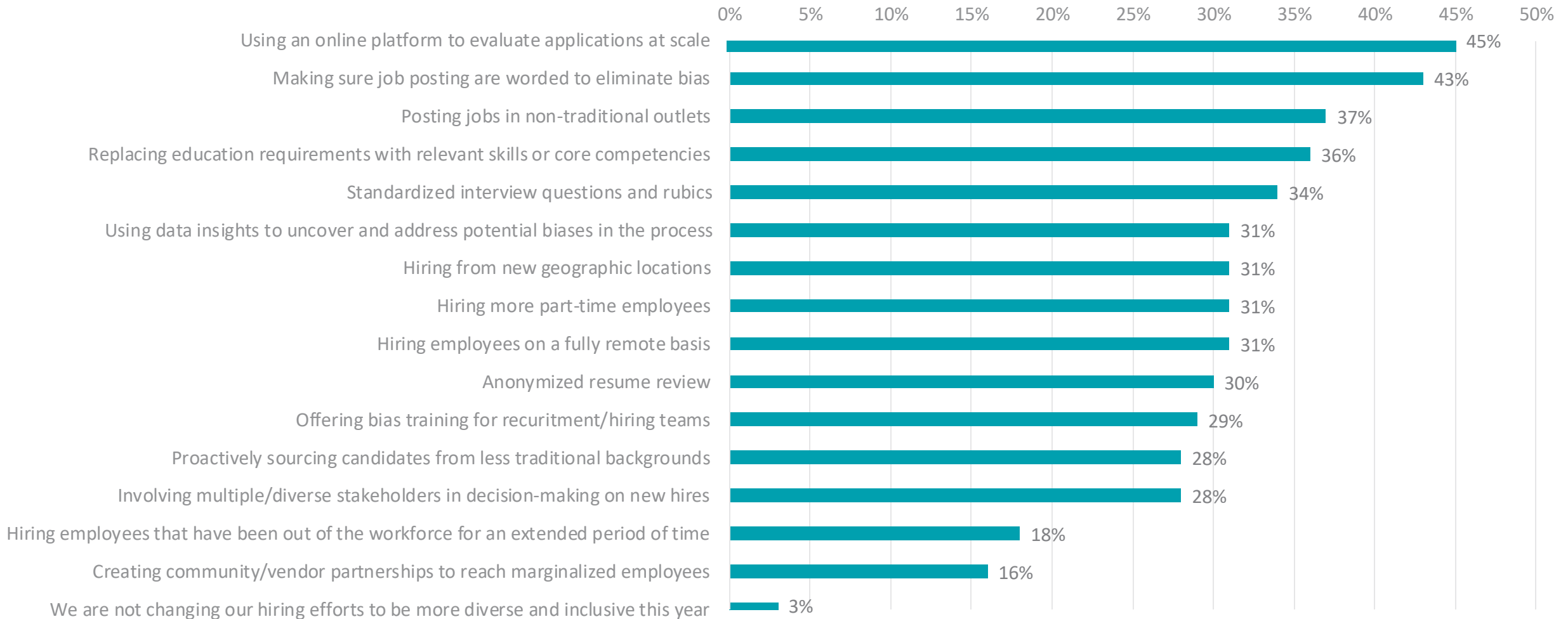


A Free Resource for Employers!



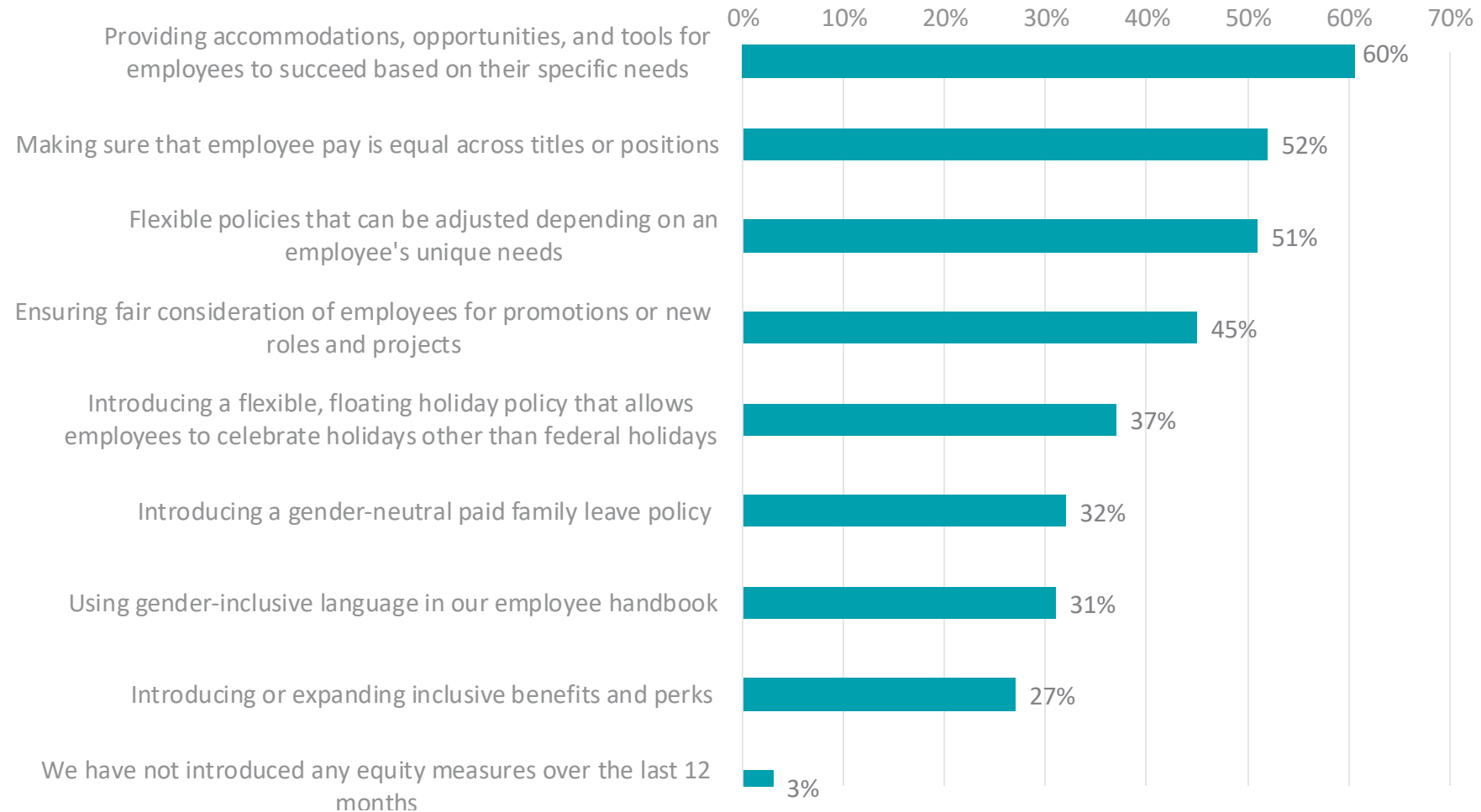
How Employers are Addressing DEI – Recruiting:

Over the past 12 months, which steps have you taken to achieve diversity in recruiting?



How Employers are Addressing DEI – Equity Measures

What equity measures have you introduced over the past 12 months?



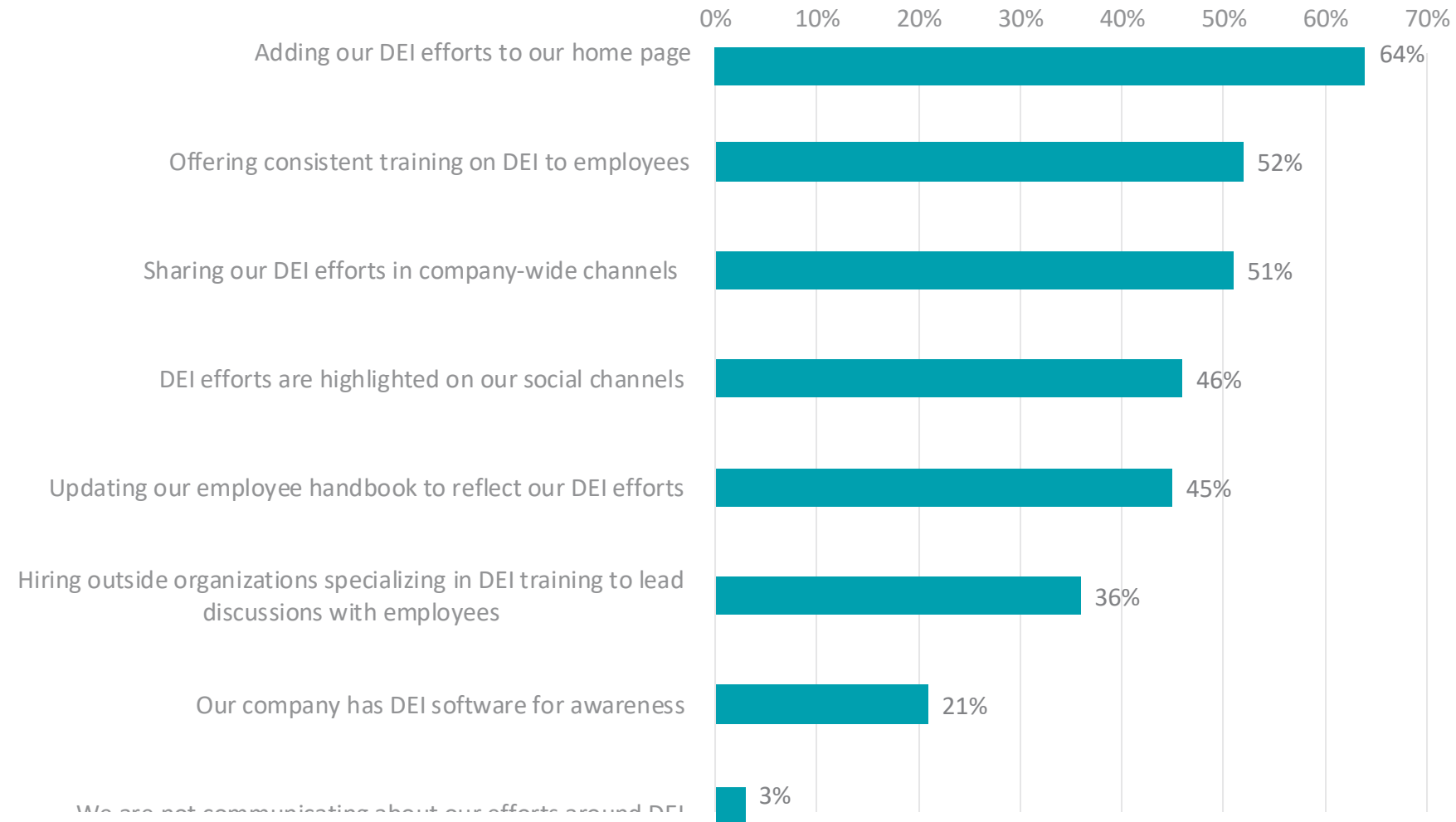
How Employers are Addressing DEI – Inclusion Efforts

What inclusion measures have you introduced over the past 12 months?



Communication Efforts Around DEI

How are you currently communicating your efforts around DEI to employees?



Job Descriptions

- Review the job description and try to see if there are any biases reflected in the description
- Get feedback from persons that have different backgrounds
- Emphasize the importance of DE&I for the company and the position



Outreach

- Signal to particular types of individuals that the company is interested in them:
 - Job fairs, recruiting at educational institutions where a demographic is well represented, or working with organizations that serve women, minorities, veterans, or the disabled
 - Advertising media that are likely to reach minority communities
 - Identifying job boards with high rates of minority participation
 - Partnering with professional associations and other organizations that serve minority communities

Conducting Interviews

- Consider the diversity of the decision-makers
- Mansfield Rule: Have we given sufficient consideration to diverse candidates?
- Use assessments or rubrics for the interviews
- Be consistent in the questions asked during the interviews
- Ask candidates questions about DE&I
- Group decisions for the candidate selection



Top Compliance and Litigation Plays to Protect Your Company

EEOC Charges Filed

Basis of charge filing	FY 2018	FY 2019	FY 2020	FY 2021
Race	32.2%	33%	32.7%	34.1%
Sex/Gender	32.3%	32.4%	31.7%	30.6%
Age	22.1%	22.4%	21%	21.1%
Disability	32.2%	33.4%	36.1%	37.2%
National Origin	9.3%	9.6%	9.5%	10.1%
Religion	3.7%	3.7%	3.6%	3.4%
Total Filings*	76,418	72,675	67,448	61,331

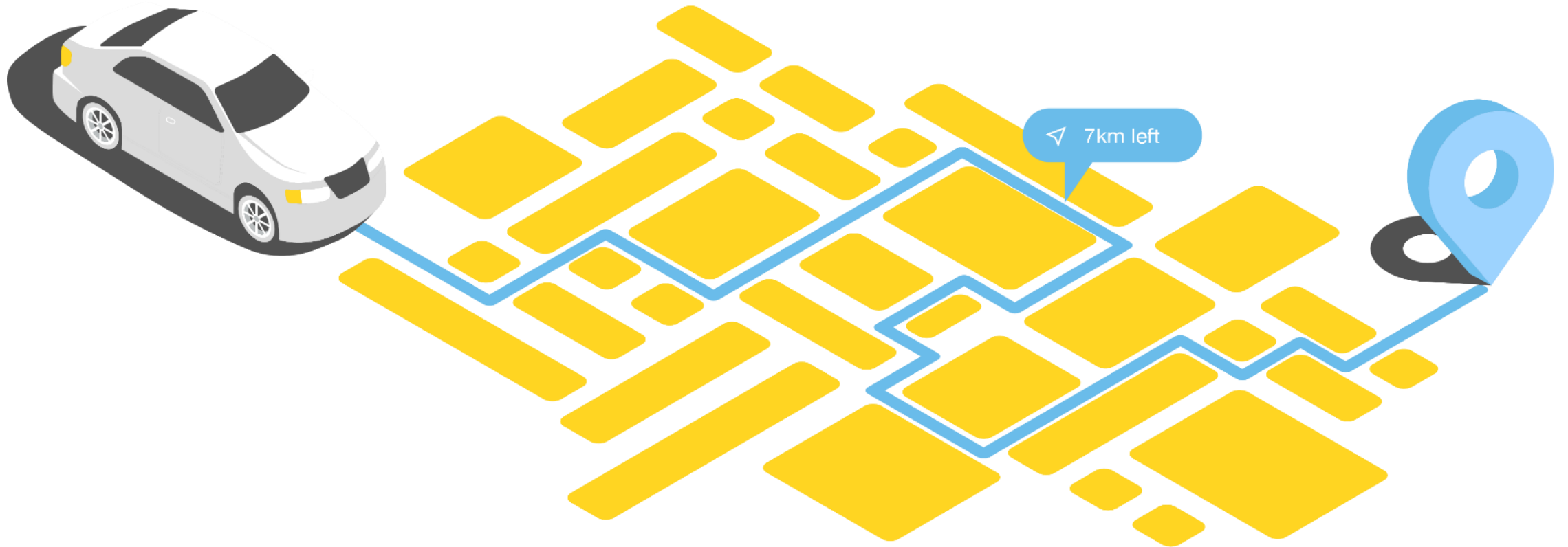
EEOC Litigation Trends – ADA Claims

Year	ALL Lawsuits Filed By EEOC	ADA Cases Filed By EEOC	Percentage of ADA Cases
2021	127	43	34.6%
2020	97	32	32.9%
2019	157	55	35%
2018	217	84	38.7%
2017	201	76	37.8%



**How to be
Proactive –
Thinking of
Discovery in
New Ways**

New Sources of Data



Sources of Electronic Evidence

Home or personal email accounts

Social media accounts (e.g., Facebook, Twitter, LinkedIn, Tumblr, Flickr, Instagram, MySpace, Vine, Google+, MySpace, Meetup.com, Orkut, Gather.com, Tumblr, Windows Live Spaces, MSN Spaces or similar accounts)

Home or personal computers, or other machines capable of sending or receiving emails or other messages or storing ESI (e.g., PDA, cell phones, smart phones, iPod Touches or similar devices, iPads, tablets, etc.)

Cloud storage accounts (e.g., Google Documents, iCloud, Zoho, Dropbox, iCloud, BackBlaze, Crashplan, Mozy, or similar internet- or “cloud”- based services that store or back-up documents, data and devices)

LinkedIn, Monster.com, CareerBuilder.com accounts or similar professional networking services

iWatch, Pebble, FitBit, Microsoft Band, Samsung Gear 2, Cookoo, Sony Smartwatch 3, Qualcomm Toq

Consider All Sources of Potential Relevant Information!

- Cell phone records can tell a compelling story
 - Records can establish who/when/where
- Text messages are also becoming increasingly relevant for credibility
 - Increasing disputes over privacy and attorney-client privilege
- Timing of these requests is critical!!

MOBILITY (with cell location)											
2837526 10/22/2019		AT&T has queried for records from 03/01/2018 12:00:00am to 03/02/2018 11:59:59pm AT&T has queried for records using Central Time Zone. AT&T's records are stored and provided in UTC.									
Run Date: 10/22/2019 Run Time: 04:57:24 Voice Usage For: (337)384-2639											
Item	Conn. Date	Conn. Time (UTC)	Seizure Time	ET	Originating Number	Terminating Number	IMEI	MSI	CT	Feature	Cell Location
1	03/01/18	12:43:04	0:08	1:14	13373842639 01113184170658 (D)	13184170658	3553140885263717 APPLE IPHONE7	310410952108969	MO	[NIOR]	[18595/35621;-91.874971;32.843056;30;-1.0]
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13	03/01/18	13:30:26	0:25	0:01	13373842639 16787619360 (P)	13374623454			MT	[NIOP;CFNA;VM]	
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AT&T Proprietary

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Page 1

Corporate Representative Depositions

- Commonly used and often abused
- What does Rule 30(b)(6) require?
 - “must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; . . . about information known or reasonably available to the [corporation].”
- Keep in mind the obligation to “adequately prepare” to testify
 - Pay close attention to topics and subject matter covered in topics
 - Investigate issues referenced in topics if necessary

Proactive Compliance Measures

Compliance Basics

Know Your Compliance Status

- Audit for legal compliance and establish a plan for improvement and messaging change.
- Document your compliance measures (good faith).

Get Familiar with State Laws

- Some states and localities have complex additional requirements.

Focused Compliance Efforts: Create Evidence to Combat the Most Common Claims

- Build evidence around specific claims if necessary.
- Implement critical policies and procedures.
- Document!!

Arbitration Agreements

- Strongly consider a mandatory arbitration agreement with a class action waiver.



Documentation Helpful to Establish Compliance

- Up-to-date job descriptions
- Job postings or recruiting materials
- The employee's resume that lists his/her job duties
- Employee performance reviews
- Employee self-assessment
- Time sheets reviewed & approved by supervisors
- Training materials
- Onboarding documents & orientation materials



Investigating in the Workplace

1	Interview Complainant
2	Plan the Investigation
3	Interview Witnesses
4	Reaching and Documenting Findings
5	Follow Up with Complainant

Your Role As An Investigator



- No biases
- Good listener
- Appropriate investigation
- Attention to detail
- Reach reasonable conclusions
- Properly document investigation
- If appropriate, recommend remedy



Policies

Being Proactive – Re-Examining Your Policies

Policies

- **Does The Company Have A Handbook with Policies to Point To?**
 - Non-Discrimination /Non-Retaliation
 - Defining Sexual Harassment
 - Reporting Procedures
 - Job Descriptions
- **Is The Company Following These Polices?**
 - Do All The Managers Follow Progressive Discipline And Document Correctly?
 - Is Every Investigation Conducted The Same Way?
 - Are All Reports Escalated the Same Way?
 - Are There Certain Forms HR Is Expected To Use For Different Situations



Will Your Policies Help Or Hurt You

- Clear and Accurate Language In A Job Description
- Using Words Correctly in All Policies
- Document Retention Policies
- Creating Clear Expectations For Employees
- Training That Accompanies Policies

Helpful

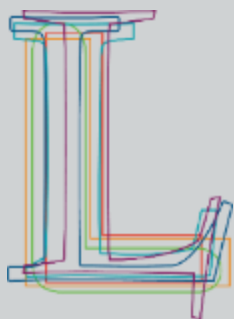
- Progressive Discipline That is Too Detailed
- Investigation Procedures That Require Particular Order or Disclosure
- Having Great Policies But Failing To Follow Them
- Policies That Are So Detailed They Are Burdensome

Hurtful



Questions?

This information provided by Littler is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute. Although this information attempts to cover some major recent developments, it is not all-inclusive, and the current status of any decision or principle of law should be verified by counsel.



Thank You!

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