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Techniques for Promoting a Productive Workplace

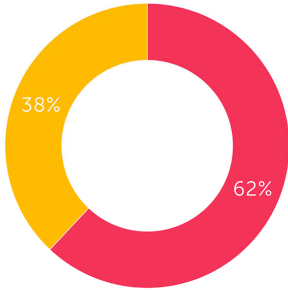
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Remote Work During the Pandemic




Remote work during COVID-19



Category	Percentage
Working from home	62%
Not working from home	38%

62% of US employees are working from home due to COVID-19.

Source: Gallup



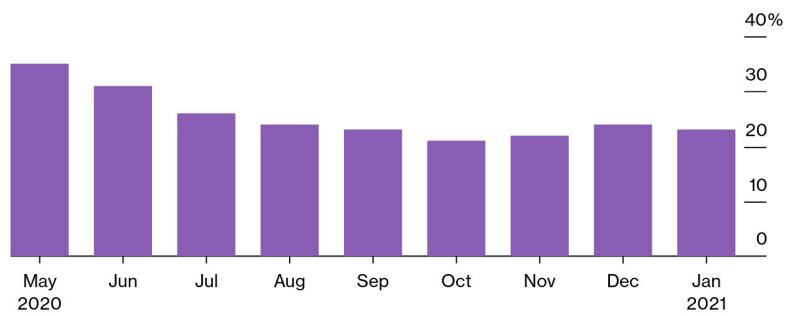
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Remote Work Trends During the Pandemic

Percent of Employed Persons Who Teleworked Due to the Pandemic



Source: U.S. Bureau of Labor Statistics Current Population Survey (<https://www.bls.gov/cps/effects-of-the-coronavirus-covid-19-pandemic.htm>)

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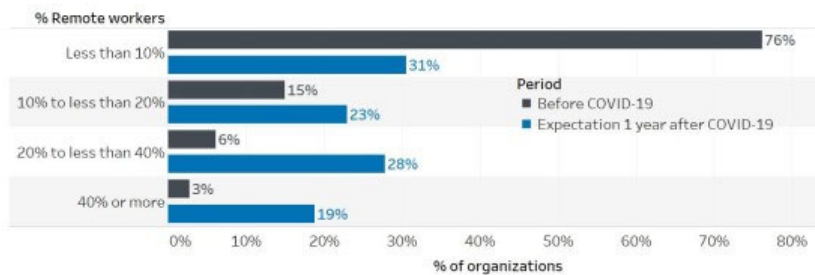
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Post-Pandemic Remote Work Expectations

Chart 1: While less than one quarter of respondents reported more than 10 percent of employees worked primarily from home before COVID-19, this share is projected to significantly increase after COVID-19

Percentage of US full-time employees working primarily from home (at least 3 days a week) before COVID-19 and expectation 12 months post-pandemic



Source: The Conference Board report "From Immediate Responses to Planning for the Reimagined Workplace: Human Capital Responses to the COVID-19 Pandemic"

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New corporate problems



"OK, which one of you just called me an asshole?"

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Remote Working Pitfalls/

- Wage Hour
- ADA
- Time Keeping
- Expenses
- Accommodation

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What are an Employer's Responsibilities Under the Fair Labor Standards Act ("FLSA")?



- An employer is required to pay its non-exempt employees for all hours worked, including work not requested but suffered or permitted to work – and work performed at home.
- If the employer knows or has reason to believe that work is being performed, the time must be counted as hours worked.
- An employer may have actual or constructive knowledge of additional unscheduled hours worked by their employees, and courts consider whether the employer should have acquired knowledge of such hours worked through reasonable diligence.
- Employers are required to exercise control to ensure that work is not performed that they do not wish to be performed.

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U.S. Department of Labor ("DOL") Guidance on Employers' Obligation to Exercise Reasonable Diligence in Tracking Remote Employee Time



- On August 24, 2020, the DOL issued a memo (FAB No. 2020-5) providing guidance regarding employers' obligations under the FLSA to track the number of compensable hours worked by remote employees.
- DOL acknowledged that it might not always be clear when an employer "has reason to believe that work is being performed."
- DOL determined and explained that employer efforts to prevent unwanted work away from the worksite is "not boundless."

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DOL Guidance (Continued)

- DOL explained that diligence can be exercised by providing a reasonable reporting procedure for non-scheduled time and then paying employees for all reported hours of work, even hours not requested by the employer.
- If an employee fails to report unscheduled hours worked through such a procedure, the employer is not required to undergo impractical efforts to investigate further to uncover unreported hours of work and provide compensation for those hours.
- However, an employer's time reporting process will not constitute reasonable diligence where the employer either prevents or discourages an employee from accurately reporting the time he or she has worked.

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Flexible Work Arrangements

- Remote employees may request a flexible schedule for personal and family obligations (e.g., caring for or teaching children).
- Friction with FLSA's "continuous workday rule."
 - Generally, all time between the first and last principal activity of the day is generally considered compensable work time for non-exempt employees (with the exception of meal or rest breaks of 30 minutes or more).
- Under the FLSA, home-to-job site travel is not compensable.

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DOL Approved Flexibility During Pandemic

- DOL published the COVID-19 and the Fair Labor Standards Act Questions and Answers (July 2020), wherein it recognized that the continuous workday rule would discourage needed flexibility during the COVID-19 pandemic.
- DOL stated that an employer that allows employees to work remotely with flexible hours during the COVID-19 pandemic does not need to count as hours worked all the time between an employee's first and last principal activities in a work day.
 - “For example, assume you and your employee agree to a telework schedule of 7–9 a.m., 11:30–3 p.m., and 7–9 p.m. on weekdays. This allows your employee, for instance, to help teach their children whose schools are closed, reserving for work times when there are fewer distractions. Of course, you must compensate your employee for all hours actually worked—7.5 hours—that day, but not all 14 hours between your employee's first principal activity at 7 a.m. and last at 9 p.m.”

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Tips to Avoid Off-The-Clock Claims

- Establish policies to clearly identify time worked to avoid excessive overtime or off-the-clock claims. The policies should:
 - Instruct employees to contemporaneously clock in and out when they begin and end their days, as well as for their meal and rest breaks (paid or not).
 - Remind employees not to work any unscheduled hours unless it is in accordance with written policies (e.g., with manager approval).
 - Careful thought should be given to what systems (email, intranet, etc.) the employee can access outside of their scheduled hours.
 - Direct employees to include all time they work in their time records, even if time was unauthorized, so it is included as hours worked for payroll purposes.

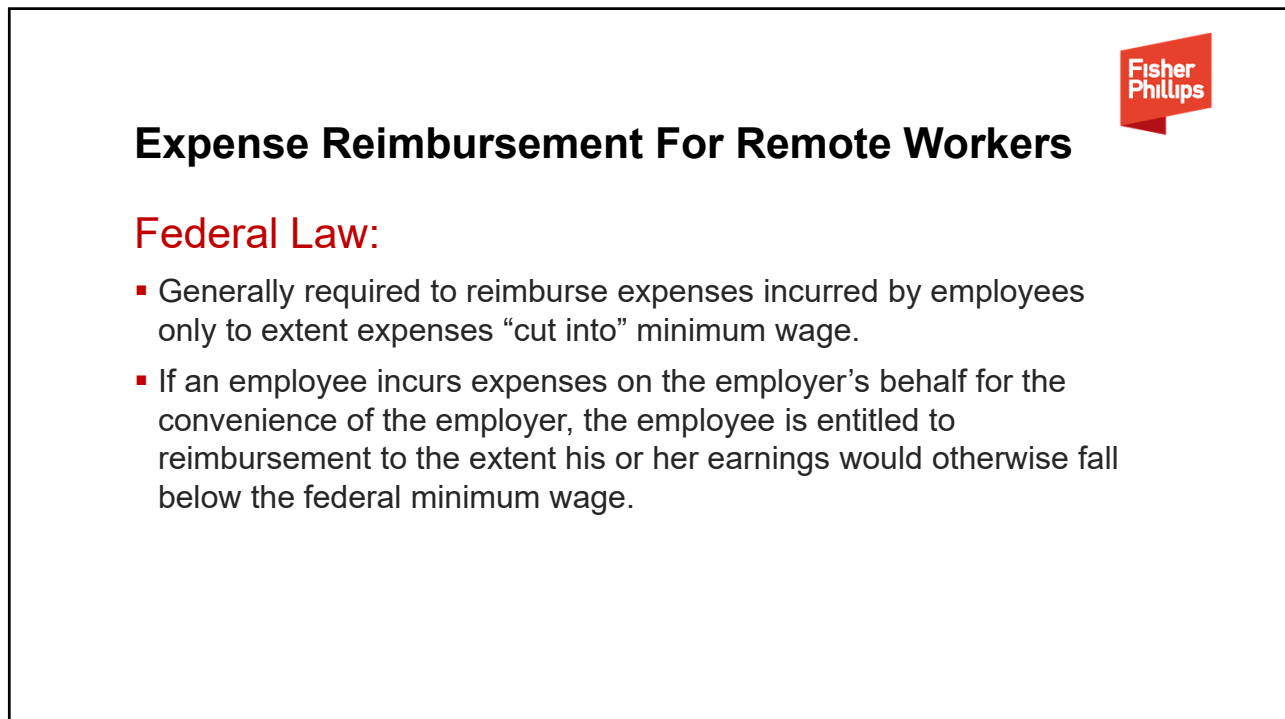
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Expense Reimbursement

- Federal Minimum Wage and Overtime
- State law

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Expense Reimbursement For Remote Workers

Federal Law:

- Generally required to reimburse expenses incurred by employees only to extent expenses “cut into” minimum wage.
- If an employee incurs expenses on the employer’s behalf for the convenience of the employer, the employee is entitled to reimbursement to the extent his or her earnings would otherwise fall below the federal minimum wage.

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Expense Reimbursement For Remote Workers

Federal Law:

- Since many remote workers earn wages above the federal minimum wage, affected employers typically face limited risk of running afoul of reimbursement obligations.
- However, there are greater risks in some states where minimum wage has risen in recent years to \$12 or \$15 per hour, daily or other forms of premium pay have been enacted, or exemptions call for a higher pay threshold than federal law.
- Employers should be on alert for any employee subject to (1) overtime requirement or (2) particular pay threshold to meet an exemption from overtime.

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Where is Work Performed?

- COVID-19 has caused some employees to leave their home states and relocate to others.
- Multi-state compliance issues arise for employers as a result of employees moving.
- Laws of state where work is performed may apply.

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Expense Reimbursement For Remote Workers

State Law:

- Several states have enacted their own expense reimbursement laws to prevent employers from passing some or all of their operating expenses on to employees.
 - California, for example, requires employers to reimburse all “necessary” and “reasonable” expenses incurred by employees in direct consequence of discharging their duties or at the direction or request of their employer.
 - Whether an expense is “necessary” turns on the reasonableness of the employee’s choice under the circumstances – expenses incurred voluntarily need not be reimbursed.

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Expense Reimbursement For Remote Workers

State Law:

- Other states, such as Illinois, Montana, New Hampshire, North Dakota, and South Dakota, have reimbursement laws similar to California, and the law in some states is a bit vague.
- Some states like Illinois expressly permit employers to adopt written policies designed to reasonably control employees’ job-related expenses (good practice to consider).

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Accommodations for Employees Working from Home



- Employee requests accommodation for the first time while working from home. What should you do?
 - Interactive process: communicate and ascertain if there is a reasonable accommodation that can be provided in his/her home to address the employees needs.
- Pre-existing accommodations: Employee receiving accommodation prior to the COVID-19 pandemic may be entitled to a continuing or adjusted accommodation during the pandemic.
- Accommodations for Employees whose disabilities put them at a greater risk from COVID-19



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Examples of Reasonable Accommodations



Examples of Reasonable Accommodations include:

- Acquisition or **modifications** of **equipment** or devices for the home such as chairs, ergonomic equipment
- Short-term restructuring of marginal duties;
- Provision of qualified readers or interpreters via zoom; and
- Temporary transfers to different position
- Modifying work schedules
- Shifting assignments

Unreasonable Accommodations may include:

- Indefinite leave
- Creating a job
- Eliminating or reassigning essential functions
- Providing a promotion
- Bumping another employee



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What is the Nature of Work Performed?

- Important question to consider in context of exempt employees.
- Aside from salary requirement, employees must also satisfy job duties requirement.



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Monitor Work Performed

- Challenges with remote work, layoffs, furloughs, salary reductions, and other workplace changes:
 - Exempt employees may be putting on different hats and tasked with covering the work of nonexempt employees.
 - When nonexempt work subsumes their responsibilities, an employee's actual duties may no longer match their intended exemption.
- Employers in such situations could be on the hook for unpaid overtime, liquidated damages, and attorneys' fees and costs.
- Employers should avoid tying salary adjustments to "hours worked" to avoid these challenges.

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Working from Home

- Should my employees work from home?
- Some considerations:
 - The need to interact in-person with others to perform the job;
 - Whether upfront technological costs are outweighed by long-term remote work benefits;
 - Security needs and the ability to maintain security remotely;
 - How a position becoming remote affects other employees; and
 - Predictability of job needs.

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Working from Home

- Decisions to allow employees to continue working from home should be carefully considered.
- Documentation of performance and production at home is necessary
 - Clear expectations
 - Plans for each week should be documented by employee, with hours expected to be spent on each task
 - Follow-up/look back on completion of tasks, or explanation for not completing tasks
 - Continue to document performance issues as you would if employees were physically present

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Working from Home

- Document issues with working from home frequently – at least as frequently as you would in-person.
 - Lack of collaboration, loss of production levels, disciplinary issues, general dissatisfaction, etc.
- Consider the impact in the future on potential requests for accommodations for other non-COVID reasons.

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Recommendations for a remote work policy:



- Employees must keep an accurate record of time worked.
- No overtime unless expressly approved in advance.
- Employees must take compliant meal and rest breaks.
- If data security is important, employees should be issued company computers and not allowed to work remotely on personal computers.
- Employees should be required to work a prescribed schedule and should not be distracted by child- or elder-care issues while working.
- Employees must create a specific work space (possibly send photos); injuries occurring away from that work space are not the employer's responsibility.

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Recommendations for a remote work policy:



- Employees may be required to come to their usual workplace as needed (if feasible).
- Employees must follow all usual work policies and procedures in the Employee Handbook, including policy against harassment, IT policy, etc.
- Employees unable to work remotely due to illness or family-care obligations must notify supervisor as required for a workplace absence.
- Employees provided with employer-owned equipment must return it at the conclusion of the remote work period.
- Employees who use their personal cell phones and internet must be given a stipend for business use.

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Recommendations for a remote work policy:



- Remote work policies should address, at a minimum:
 - Required work hours;
 - Meal/rest periods;
 - Maintaining an appropriate work space free of distractions;
 - Time and attendance expectations;
 - Whether employees must obtain permission prior to working outside of regular work hours (or working overtime).

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Being Proactive: Policies to Consider Putting In Place



- Updating handbook to make policies clear for employees / managers
- Creating a voluntary diagnosis / disclosure approval to allow for open communication with employees
- Emergency remote work policies
 - Be careful – you may not want to create a precedent now that employees can do all job functions from home as it will impact “reasonable accommodations” later
- Travel authorizations for necessary businesses

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Employee Monitoring in a Remote Work Environment



Reasons

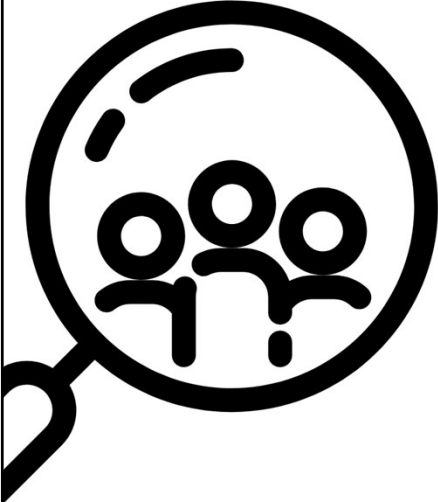

- Monitoring productivity/active working time
- Keeping track of hours for non-exempt employees
- Ensuring compliance with privacy/confidentiality obligations for sensitive data

Methods

- Keystroke monitoring
- Applications/software/website monitoring
- Photos taken remotely

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Employee Monitoring in a Remote Work Environment

- State laws that must be considered
- National Labor Relations Act considerations
- What to do with all that employee data collected
- AI technology
- Vaccine tracking and pandemic-related information – add a new layer to employee privacy


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Statutory Compliance – Getting More Complex

- Current and pending state legislation in the United States:
 - Biometric privacy (Illinois, Washington, Texas, California, New York, Arkansas)
 - Data breach laws: 50 states, 50 separate statutes
 - Consumer privacy (CA, FL, NY, VA, WA)
- Employee accessibility under the ADA
- Employer anti-harassment, discrimination, and retaliation policies must be adapted to remote work
- FTC likely to become more active under Biden administration




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What do employees really want...

Research tells us that employees are looking for two fundamental experiences from work:

- (i) Connecting with people and being inspired by the purpose of the organization, and
- (ii) Contributing work as well as being able to grow and be rewarded accordingly.

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What has Covid-19 done in the workplace



Most agree, Covid has accelerated trends that were already underway, but most specifically 3 things have occurred:

- Increased use of temporary workers.
- Accelerating the automation of highly repetitive tasks.
- *Tremendous imbalance of talent* between thriving versus declining industries.

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Effective communication



Not all employees get effortlessly comfortable with work from home culture without any guidance.

Therefore organizations must provide technical support to employees and communicate regularly through online meetings so that they don't get demotivated with difficulties in a new environment.

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Establish a clear plan for communicating with each member of your team



- Determine the best mode. (Phone, email, Skype, Zoom, Microsoft Teams, etc.)
- Make sure everyone knows how to use the selected communication platform.
- Set a schedule for regular communication that works for your team's needs. (Every morning, twice a day, several times a week, etc.)

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Establish a clear plan for your team's communication with key stakeholders.



- Make a list of who needs to be updated and what those communications will be.
- Communicate within your team about the status of those communications.
- Reach out to stakeholders, providing updates as needed.

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Set up the meaningful target



The key to engaging employees to work and maintain efficiency in a remote environment is by setting up meaningful targets that are achievable considering the current pandemic situation.

There will be a difference in employee's efficiency when they work in office environment and when they work from home.

Therefore managers must consider these aspects before assigning any job to employees.

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Celebrate achievements



Employees get demotivated if their hard work doesn't get appreciated, and they stop putting all their efforts in the next task they get assign.

Therefore recognizing a job well done, minor successes, valuing teamwork is essential for an organization so that employees will get the motivation to work hard.

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Encourage New Learning



During busy office hours and long commuting time, many employees are unable to pursue the learning or hobby they want, which is now possible with work from home set up.

When an organization promotes learning, it keeps its employees motivated because eventually, everyone wants to do a job that helps them learn new skills and grow as individuals.

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Promote Health and Wellness



To make sure employees keep staying motivated, the organization must ensure their physical and mental wellbeing.

During this pandemic time, the health of employees should be the primary objective of any organization.

Due to coronavirus, employees are forced to stay indoors and isolate themselves, which might lead to developing depression or anxiety among them.

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Motivating thru performance reviews



- Remember – what do employees really want –

- **Connection/Contribution**

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Performance Evaluations



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What is the purpose of performance reviews..



To follow a process that contributes to the effective management of individuals and teams, in order to achieve their goals and organizational success.

Effective performance management should create alignment and a shared understanding of what has to be achieved and what individuals or teams have to do, learn, and develop to be successful.

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Benefits of Performance Evaluations



- They accomplish important objectives
 - Goal setting and motivation for the employee
 - Reinforces good performance (and the reverse)
 - Basis for raises, bonuses, and performance
 - Makes record (good/bad) for legal defense

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What does that mean?



When done right, evaluations should establish a language and goals around behaviors or skills.

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Drawbacks of Performance Evaluations



- Imprecise measurement
 - Performance, as opposed to the person, is difficult to objectively measure
- Unnatural timing
 - Evaluating long after problematic performance or conduct has occurred is difficult
- The halo effect – overly positive reviews
 - *E.g.*, one category winners; long-term employees; favored employees; employee hired by reviewer; managers afraid of confrontation
- The hard grader (and proud of it)
 - Managers attempting to compete with other divisions or departments may be overly critical

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Evaluations Start with Assignments

- Remember the employees' evaluations are based on their work product
 - Their work product is based on assignments provided by the supervisor
- Therefore it is important that:
 - Expectations are clearly laid out and explained;
 - Job descriptions are up to date;
 - Proper training was provided; and
 - The manager did what he/she could to help the employee succeed

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Preparing the Evaluation

- Don't surprise the employee with the evaluation
- Attempt to focus the appraisal on examples of conduct rather than conclusions regarding conduct
- Separate performance from personal factors such as length of service, effort, and halo effect

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Performance Evaluation Examples



- | | |
|---|--|
| <ul style="list-style-type: none"> • Bad: <ul style="list-style-type: none"> • Does not get along with co-workers.
 • Bad: <ul style="list-style-type: none"> • She is the best assistant I have ever had. | <p>Good:
He has gotten into arguments with co-workers on four occasions without provocation; he does not volunteer to assist when co-workers are busy; and co-workers have complained regarding his rudeness.</p> <p>Good:
She gets along well with clients; she anticipates needs before asked; she is accurate in document preparation; and she delegates work well when I am unavailable.</p> |
|---|--|

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More Examples . . .



- | | |
|--|---|
| <ul style="list-style-type: none"> • Bad: <ul style="list-style-type: none"> • Attitude needs improvement.
 • Bad: <ul style="list-style-type: none"> • His performance meets expectations. | <p>Good:
He does not support initiatives of management; he is inappropriately critical in front of subordinates; and he has missed important meetings due to avoidable conflicts.</p> <p>Good:
He has not made significant errors in the past year but there is room for improvement; he needs to develop his skills further in terms of book keeping knowledge and we would like to see him attend some training in several key areas.</p> |
|--|---|

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Delivering the Evaluation



- Schedule meeting at appropriate time
- Be ready to justify ratings
- Do not attempt to soften the blow
- Get the form signed
- Keep the signed form

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After the Evaluation



- Do not discuss evaluation scores with other employees
 - But assume they will all learn how others were reviewed
- Don't wait until next year to deal with problem employees
 - There is a certain implied "improved" rating when there is no further action

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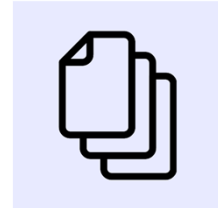
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Performance Management During COVID



Don't Wait Until Its Too Late –

- Good performance management documents employee performance systematically – not **only** when the problem has come to a head.
- But be sure to document problems.
- Use a combination of observation feedback, evaluation form feedback, **emails**, and counseling/coaching forms.



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Performance Management During COVID



- Not all documents are created equally
- Which would you rather have to rely upon?
 - Note to “file”
 - Email to HR
 - Email to Employee
 - Employee Observation Form
 - Formal counseling document signed by employee



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Is your performance management going to stand up in court?



- Employees must be treated consistently – is this something other employees are also doing wrong?
 - Do not give even the appearance of favoritism.
 - Comparable situations will be discovered.
- Has poor performance been excused/ignored in the past?
 - Don't go from zero to 100 MPH. . .build accountability incrementally.
- If there has been a violation of policy, is the policy clear? Is it in writing?

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Performance Management During COVID



- Think about what performance or interaction deficiencies you want to see addressed and by what timeframe
- Write out your specific, measurable goals
 - “You must give at least three non-multiple-choice questions per each assessment”
 - “Have all student grades posted within department guidelines.”
 - “Participate in every staff meeting.”
 - “Integrate technology into your lessons.”

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Ensure All Your Communications Are Appropriate



- Make sure there is no language in the reviews that could infer bias in any form of communication (“Mr. Smith doesn’t seem to be able to work with technology due to his age”)
- Be careful in how you describe people (“Mr. Williams has a grandfatherly demeanor”)
- When criticizing attendance, be careful with job protected leave



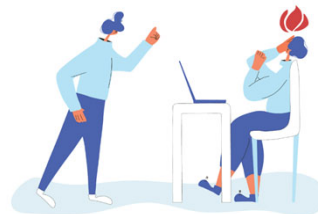
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Performance Management During COVID

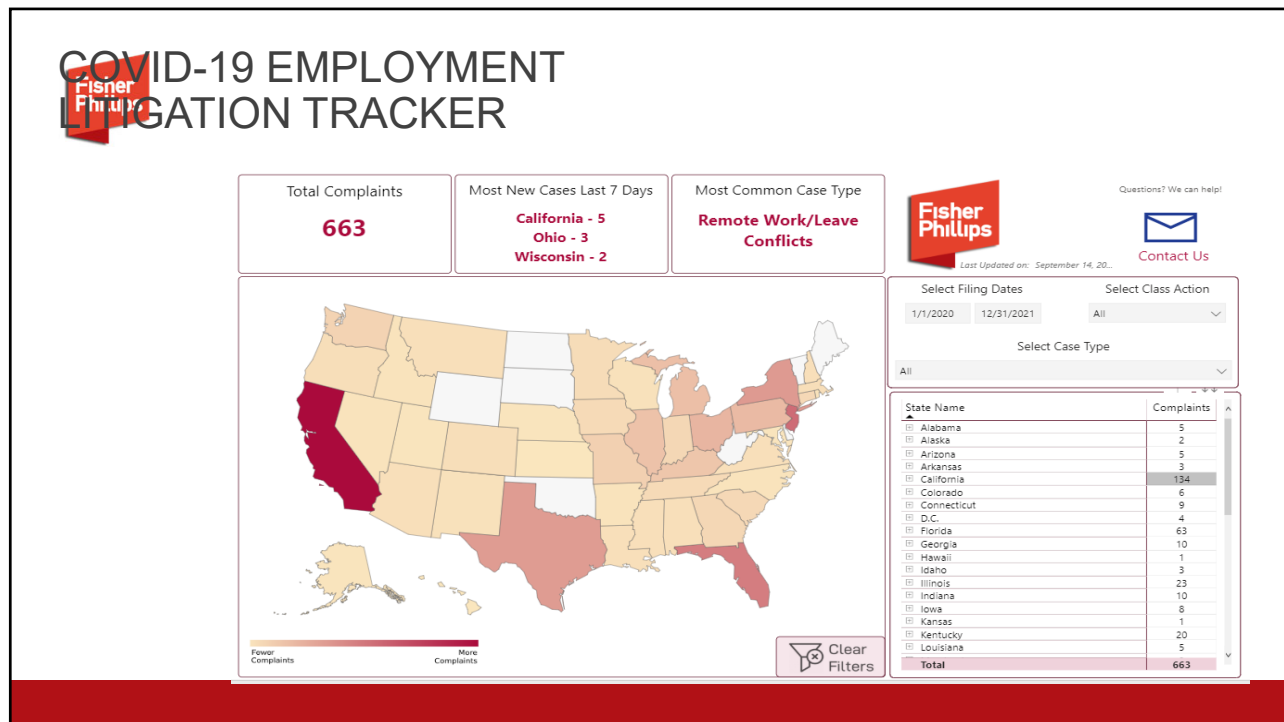


- If you are considering non-renewal/termination, consider:
 - Have you taken yourself out of at-will?
 - Must follow terms of contract, offer letter, policy, etc.
 - Notice
 - For Cause/Ability to Cure
 - Severance
 - Handbook provisions
 - Progressive discipline




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COVID-19 LITIGATION EXPOSURE

What is the greatest risk area for employers based on recent litigation filings?

(A) Retaliation / Whistleblower claims

(B) Employment Discrimination claims

(C) Remote Work / Leave Conflict claims

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