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OAB Employment Law Update 2022

Ohio Association of Broadcasters

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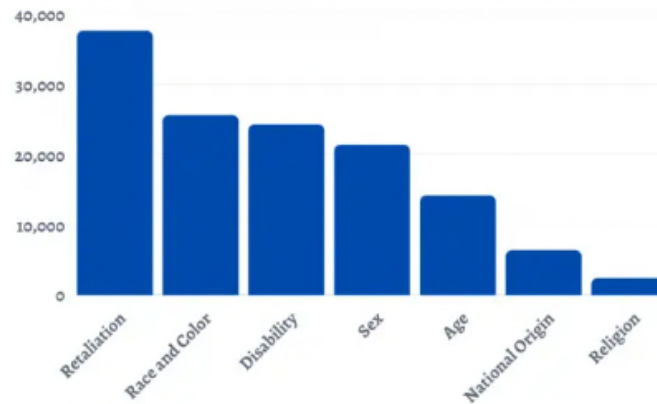
Topics for Today

- **Long COVID and The Law:** EEOC and OSHA updates on accommodating workers with Long COVID and other chronic health conditions
 - When is an employer required to accommodate a disability?
 - When is Long COVID or other medical condition a “disability?”
 - What COVID-related accommodations may be required?
 - Could a caregiver of a COVID or “long COVID” patient also be entitled to accommodations?
- **Quiet Quitting and the Great Resignation:** Protecting your business in times of heightened turnover and a tight job market
- Update on discrimination issues/developments

Discrimination and Retaliation Claims

The Most Common Forms of Workplace Discrimination

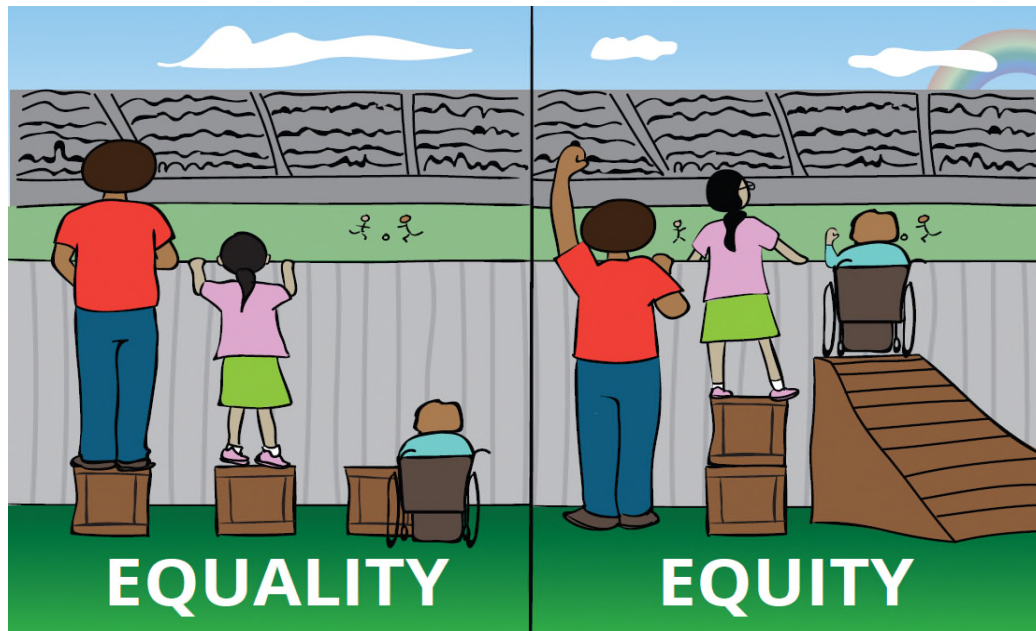
EEOC data reveals the most frequent workplace discrimination claims in 2020.



\$439.2 million recovered for victims of workplace discrimination.

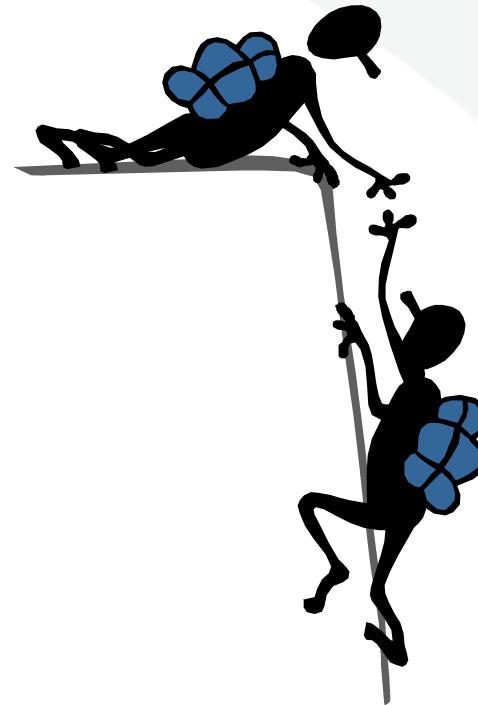
EEOC data 2/26/2021

Disability discrimination

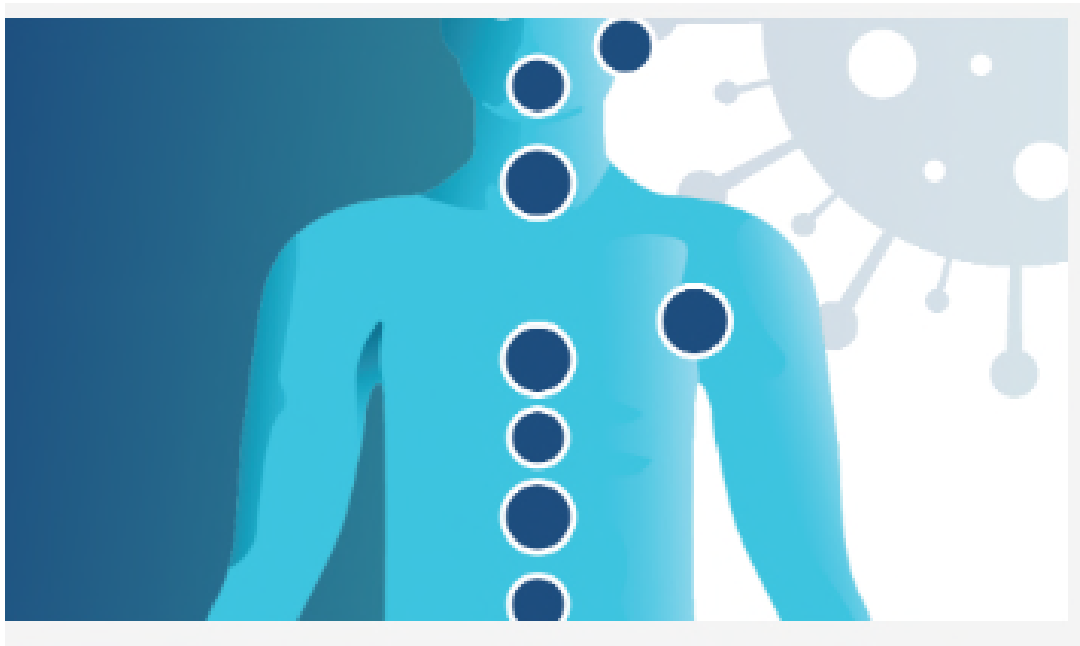


Remember...

- The ADA protects qualified individuals with disabilities and requires COSI to provide a **reasonable accommodation** to those individuals so that they may perform their jobs.



Long COVID



COVID – Still With Us

- More than 60% of the U.S. population has been infected with COVID at least once
- Over 1 million Americans have died of COVID
- Census Bureau: About 16 million Americans have “long COVID”
- CDC: 7.5% of COVID patients have symptoms lingering 3 months or longer
- Federal Reserve Study: 24.1% of people who have contracted COVID-19 experienced symptoms for three months or more
- As many as 4 million full-time equivalent workers could be out of work due to long COVID, at any given time – 2.4% of the US working population

What is “Long COVID?”

- Individuals infected with COVID-19 continue to experience a wide range of physical, mental, emotional, and psychological symptoms after their initial infection, impacting their daily lives
- Typically if symptoms last 3 months or longer the individual may be said to have “long COVID” or “long haul COVID,” or something similar

Brain

(headache, “brain fog” or other cognitive impairment, stroke)

Nose/nasal cavity

(loss of taste or smell)

Lungs

(cough, shortness of breath)

Heart

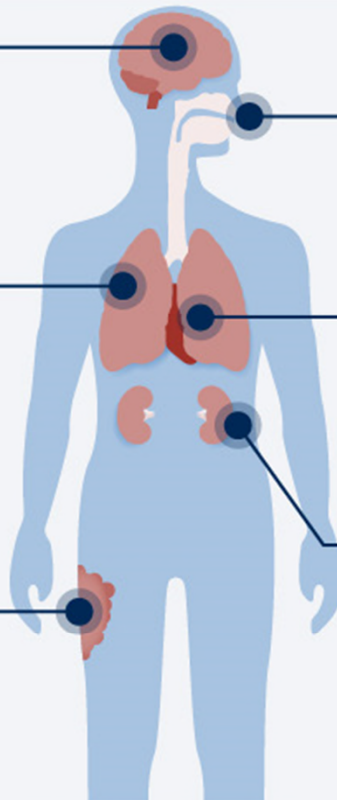
(pounding heart, heart failure)

Skin

(bruising, rashes)

Kidney

(increased risk of acute kidney injury and kidney failure)



Source: GAO analysis of Centers for Disease Control and Prevention information and medical literature. | GAO-22-105666

COVID May Require Accommodation

- COVID or its longer term aftermath may meet the criteria of a “disability” under the American With Disabilities Act (ADA)
- If so, the employee may request a “reasonable accommodation”
- The employer is then required to conduct an “interactive process” to determine whether the requested accommodation is “reasonable” and whether the employee can do the “essential functions” of the job either with or without an accommodation
- So what does the ADA require when an employee has “long COVID” that affects attendance or job performance?

Which Employers May Be Required To Accommodate Employee Disabilities?

- Federal ADA: All employers with 15 or more employees
- Ohio Chapter 4112, which tracks ADA: 4 or more employees

3 Key Elements of the ADA

1. Disabled – or “regarded as disabled” individual who is “otherwise qualified” to do the job
2. An interactive process to determine what if any accommodations the employee needs
3. Determining whether a reasonable accommodation is available that is not an undue hardship to the employer

ADA 101 – Terminology

What is a Disability?

- Physical or mental impairment that substantially limits a major life activity – interpreted very broadly to include most medical conditions
- Employee covered if she either has a disability or is “regarded as having” one by her employer

What is the Interactive Process?

- A discussion about an applicant’s or employee’s disability and performance of essential job duties

What is a Reasonable Accommodation?

- A change in the workplace that allows a person with a disability to perform the essential functions of their job AND does not cause undue hardship on the employer

What Constitutes Disability “Discrimination?”

- Employee is either disabled or “regarded as” disabled
- Employee is “otherwise qualified” to do the essential functions of the job
- Employee is either denied a reasonable accommodation that would allow them to do the essential functions OR suffers an “adverse action” (termination, failure to hire, etc.) due to their disability

What conditions may be “disabilities?”

- Definition: “Substantially limits a major life activity”
- Can be physical, emotional, mental
- Temporary conditions may not fit the test
 - Example: Because each COVID case is different in severity and duration, one person’s COVID may be a “disability” while another person’s is not
 - Recent cases have found that symptoms lasting for two months could constitute a “disability”

Accommodating a Disabled Employee

- In most cases, assume the employee is in fact “disabled” under the ADA
- Then ask: does the employee require any sort of accommodation – any change in the way the work would otherwise be done – in order to do the essential functions of the job?
- This is know as the interactive process

The Interactive Process

Questions to consider:

- What limitations are caused by the disability
- How the requested accommodation will effectively address those limitations
- Whether that requested accommodation or any other could effectively address the issue, and
- How a proposed accommodation will enable the employee to continue performing the "essential functions" of the e position

The Interactive Process (cont'd)

What can employers ask for during the interactive process?

- Written request describing the accommodation
- Medical release
- Medical documentation
 - Nature
 - Severity
 - Duration
- Limitations on life activities
- Limitations on essential job duties
- Medical exam, if proper documentation not provided

Reasonable Accommodation

An adjustment or modification provided by an employer to enable people with disabilities to access equal employment opportunities.

If a reasonable accommodation is needed and requested by an individual with a disability to apply for a job, perform a job, or enjoy benefits and privileges of employment, the employer must provide it unless it would pose an undue hardship.

Disability accommodations for Long COVID

- July 26, 2021, the Department of Justice (DOJ) and the Department of Health and Human Services (HHS) issued “Guidance on ‘Long COVID’ as a Disability Under the ADA, Section 504, and Section 1557”
- The CDC uses the terms “long COVID,” “post-COVID,” “long-haul COVID,” “post-acute COVID-19,” “long-term effects of COVID,” or “chronic COVID” to describe various post-COVID conditions, where individuals experience new, returning, or ongoing health problems four or more weeks after being infected with the virus that causes COVID-19

EEOC on Long COVID

- Extended symptoms resulting from COVID may render the individual “substantially limited in a major life activity.”
- Caution also concerning “regarded as” or “history of” disability with COVID.
- Each case fact specific.

Can Extended Leave – For Long COVID Or Other Conditions – Be A “Reasonable” Accommodation?

- Generally, actually *doing* the job is an essential function of every job – so extended time away might not seem like a reasonable accommodation
- But in some cases, leave – paid or unpaid – may still be a form of reasonable accommodation
- There is no single formula as to when a leave becomes “unreasonably” long
- Rule of thumb: If you have 50+ employees and the individual qualifies for FMLA, 3 months would typically be the minimum “reasonable” leave period – assuming that the employee’s disability actually makes them unable to do the essential job functions for that length of time

Employee Leave Under the ADA – According to the EEOC, Leave Can Be a Reasonable Accommodation

“The purpose of the ADA’s reasonable accommodation obligation is to require employers to **change the way things are customarily done** to enable employees with disabilities to work. Leave as a reasonable accommodation is consistent with this purpose when it enables an employee to return to work following the period of leave.... **An employer must consider providing unpaid leave to an employee with a disability as a reasonable accommodation if the employee requires it, and so long as it does not create an undue hardship for the employer.”**

Employee Leave Under the ADA – According to the EEOC, Leave Can Be a Reasonable Accommodation!

- According to the EEOC, leave can be a reasonable accommodation even when:
 - The employer does not offer leave as an employee benefit;
 - The employee is not eligible for leave under the employer's policy; or
 - The employee has exhausted the leave the employer provides as a benefit (including leave exhausted under a workers' compensation program or the FMLA or similar state or local laws).

Employee Leave Under the ADA

- Factors to consider when deciding whether leave would be a reasonable accommodation for an employee:
 - Length of the leave and leave already taken;
 - Position of employee – what would be the impact of a protracted absence on other workers?
 - The likelihood of the leave allowing the employee to return to work with/without a reasonable accommodation; and
 - Impact on the employer's operations.

Employee Leave Under the ADA – whether for Long COVID or Other Conditions

Good questions to ask:

How much time off have they already taken?

How many extensions have they already received?

Is their condition improving?

What is their doctor's estimated recovery period?

How does this period of leave compare with others you have/have not allowed?

Employee Leave Under the ADA – Medical Documentation

- Can you request medical documentation if an employee requests leave or if leave is being considered as a reasonable accommodation?
- Generally, an employer may request medical documentation to confirm that a condition is a disability and/or that leave is required. Typical information requested includes:
 - Reason the employee needs leave;
 - The length of the leave;
 - Whether leave will be a block of time or intermittent; and
 - Whether another reasonable accommodation might be possible.

Employee Leave Under the ADA –

- At what point is leave no longer reasonable?

A few weeks
to a few
months may
be reasonable

Intermittent
absences can
be reasonable
in certain
circumstances

An **indefinite**
period is
unreasonable

Long Covid ADA case – *Brown v Roanoke Rehab* (D. Alabama February 2022)

- Plaintiff Brown, a hearing assistant, had COVID, isolated at home for over two weeks per his doctor's instructions
- Was continuing to have “brain fog” and other symptoms
- Employer policy required employee to report for work 7 days after first positive COVID test and be tested at work
- Employee refused, due to ongoing symptoms and doctor's instructions to isolate
- One week later, still isolating, was fired per policy

Court: Sides with Employee, Denies Employer's Motion to Dismiss

- Brown's COVID symptoms fit the definition of a disability – Brown had “severe weakness, fatigue, brain fog, high blood pressure, cough, difficulty breathing, fever, and swollen eyes.”
- Employer never even considered providing more leave time as a possible accommodation
- Lesson: Whether it's COVID or any other condition, follow the doctor's assessment about returning

When is Extended Leave Unreasonable? *Coles v. Johnny Appleseed Broadcasting* (N.D. Ohio 2020)

- On-air talent, Coles, requested extended leave due to severe medical conditions, including a paralyzed vocal cord
- Coles was on leave for several months and could not provide a specific date by which she would be able to return
- Coles admitted that she was unable to do the essential functions of her job throughout this period
- Doctor's notes indicated Coles either could not work at all or could only work from home
- Fired after 5 months of leave

Coles v. Johnny Appleseed (cont'd)

- Court: To be protected by the ADA, you must be “otherwise qualified” to do the job functions
- Undisputed that Coles could not perform her job
- Indefinite leave is not a “reasonable” accommodation
- Coles also claimed that she had requested an accommodation of part-time work consisting of editing and other functions that would not require her to speak
- Court rules that such request was never explicitly made – that her doctor indicated Coles could not work - and that the employer is entitled to rely on the medical evidence provided

Interactive Process for ADA Accommodation (*Green v. BakeMark USA, LLC*)

- Plaintiff: Operations manager in Cincinnati, responsible for directing and coordinating all warehouse activity.
- Employer: Food products and services provider.
- Plaintiff underwent surgery related to thyroid cancer but returned to work without restrictions.
- Plaintiff had to once again undergo surgery due to thyroid complications, and requested leave.
- He was unable to return to work when his leave ended. He instead submitted doctor's note stating that "due to medical issues" he would need an additional month of leave.

Interactive Process for ADA Accommodation (*Green v. BakeMark USA, LLC*) (cont'd)

- Employer granted the additional month of leave but notified Plaintiff that it would need additional information from Plaintiff's doctor for leave beyond that one month extra.
- Employer also flew in managers, at least intermittently, to cover Plaintiff's responsibilities.
- Plaintiff returned to work and resumed his normal job responsibilities.
- Plaintiff then had another health issue. Employer placed Plaintiff on job-protected leave.

Interactive Process for ADA Accommodation (*Green v. BakeMark USA, LLC*) (cont'd)

- Employer attempted to negotiate with Plaintiff about his return and both parties agreed to a private mediation.
- In mediation, Plaintiff informed Employer he was completely unable to work and did not know if, or when, he would be able to return.
- Employer notified Plaintiff that it was unable to accommodate an indefinite leave of absence and terminated his employment.
- Plaintiff sued for failure to accommodate.

Interactive Process for ADA Accommodation (*Green v. BakeMark USA, LLC*) (cont'd)

- Court ultimately sided with Employer and found Plaintiff's request for accommodation unreasonable.
- Plaintiff's proposed accommodation would have allowed him to perform only some essential functions of his position, some of the time. The ADA requires more.
 - Several members of Employer's management testified that the operations manager position required, at a minimum, fifty-hours a week.
 - There was a written job description for the operations manager that emphasized the full-time nature of the job.
 - Showed the burden on Employer because it frequently flew in other managers to cover for Plaintiff during most, if not all, of his absence.

Interactive Process for ADA Accommodation (*Green v. BakeMark USA, LLC*) (cont'd)

Take-Aways

- Employer appropriately interacted with Employee to find a reasonable accommodation.
 - Scheduled meetings with Employee to discuss his restrictions. Held these discussions through telephone as much as possible.
 - Repeatedly attempted to schedule meetings when Employee declined to one.
 - Participated in private mediation to discuss Employee's proposed accommodations.

EEOC Caregiver Discrimination Guidance



EEOC Caregiver Discrimination Guidance

- Caregiver discrimination violates federal laws when it is based on an applicant's or employee's protected characteristic
 - Race, Color, Religion, Gender, National Origin, Age
- It is also unlawful for an employer to discriminate against an applicant or employee because of that person's *association with* an individual with a disability.

EEOC Caregiver Discrimination Guidance (cont'd)

- Long COVID as Disability: On July 26, 2021, the Department of Health and Human Service and the Department of Justice jointly published guidance on long COVID as a disability under the ADA.
- On March 14, 2022, EEOC updated its COVID-19 Pandemic and Caregiver Discrimination guidance to address federal employment discrimination principles involving employees responsible for caring for individuals with disabilities.
- Since long COVID can be a disability, then caregivers for people with long COVID or lingering symptoms are protected from discrimination under the ADA based on their association with the care recipient.

EEOC Caregiver Discrimination Guidance

- Encourage employees to communicate caregiving demands and requests for accommodations.
- Avoid assumptions about an employee or applicant's caregiver demands!
- Be mindful of the intersection of discrimination based on association with someone with a disability and gender discrimination.

“Take-Home” COVID



“Take-Home” COVID-19 Litigation (cont’d)

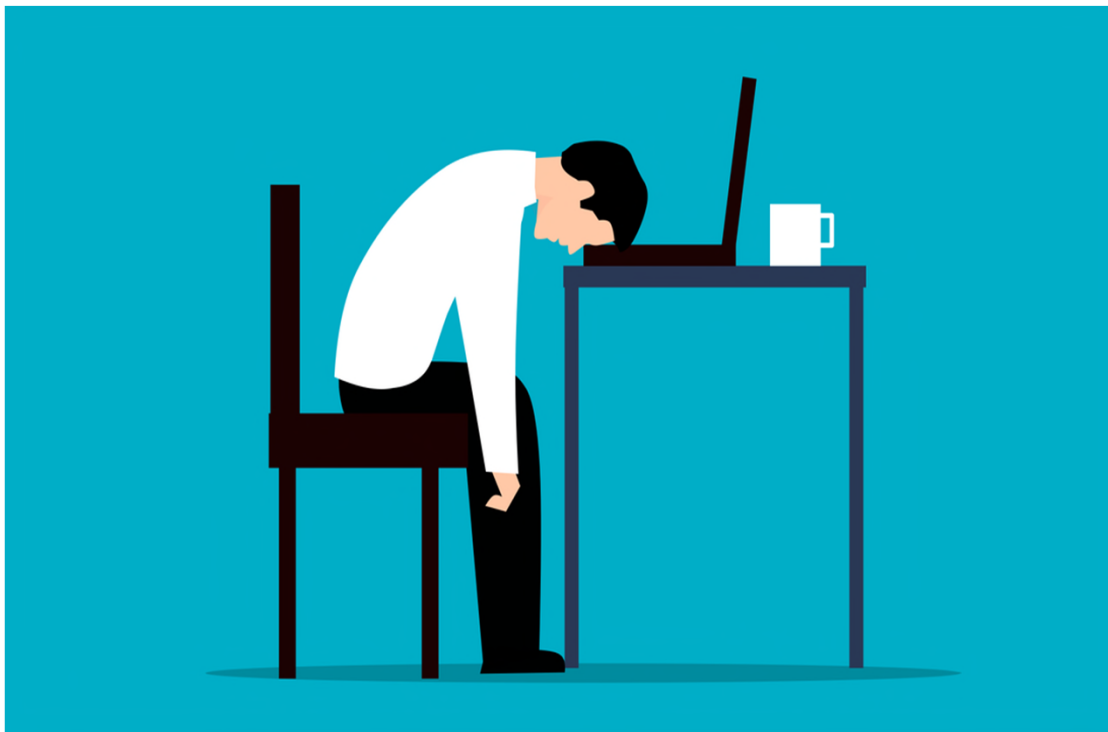
Corby Kuciemba, et al. v. Victory Woodworks, Inc.

- Personal injury lawsuit arising out of Ninth Circuit (California).
- Plaintiffs sued Employer alleging that negligence by the Employer caused Employee to catch COVID at work, then bring it home to his spouse, who spent a month hospitalized on a respirator
- Plaintiffs claimed that Employer negligently allowed COVID-19 to spread from a work site to their household.

“Take-Home” COVID-19 Litigation (cont’d)

- This lawsuit raises important questions:
 - What is the scope of an Employer's liability in tort for the spread of COVID-19 – or any other infectious disease?
 - Does an Employer owe a duty under state law to the *households of its employees* to exercise ordinary care to prevent the spread of COVID-19?
 - Is this scenario covered by workers comp?
- Case has been sent to California Supreme Court for clear guidance to these questions.

Quiet Quitting and The Great Resignation



What is “Quiet Quitting”

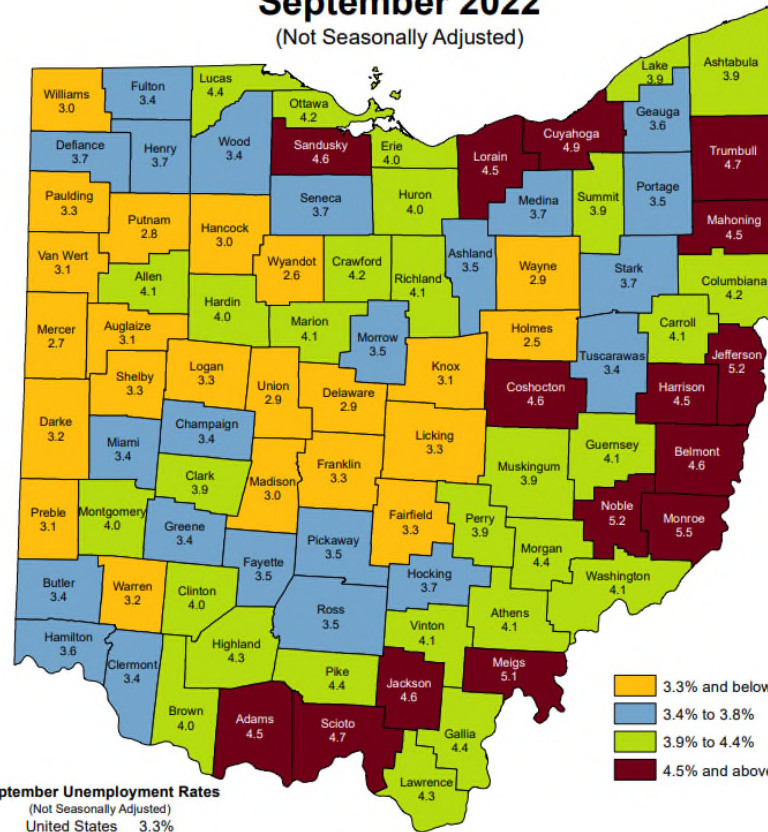
- A post-Pandemic trend
- Doing the bare minimum to keep you job
- Set boundaries
- Don't strive for perfection
- Don't check email after hours or work evenings or weekends

"With [layoffs](#) and [firings](#) at a record low... people have unprecedented job security," says Julia Pollak, chief economist at the job-search website ZipRecruiter. "And so the risk of termination is lower. And that's also why the incentive to work harder is reduced. The consequences of being found to shirk have become much smaller. One, because companies can't afford to fire people. And two, because there are so many alternatives out there if you do lose your job."

Quiet Quitting/Great Resignation

- 94% of employers reported that they have experienced more difficulty than normal in retaining and recruiting workers over the past year, with more than half (53%) reporting “severe” difficulty compared to normal times.

Ohio Unemployment Rates September 2022 (Not Seasonally Adjusted)



September Unemployment Rates
(Not Seasonally Adjusted)
United States 3.3%
Ohio 3.8%

Ohio Department of Job and Family Services
Office of Workforce Development - Bureau of Labor Market Information

Quiet Quitting – for Reduced Pay?

- A July 2022 survey by online job site FlexJobs found that nearly two-thirds of respondents would take a pay cut to improve their work-life balance.
- Yet in many job categories, wages continue to rise.

Potential Legal Issues from Quiet Quitters: Wage/Hour

- Is it legal to require employees to be available at all times to answer emails and text message or do other work?
- Must employees be paid for time spent answering after-work messages?
- Answer: It depends

Wage/Hour Basics

- Fair Labor Standards Act: Unless they meet one of the exemptions, most workers have to be paid for all the time they work – including work-related emails and text messages – which may include overtime
- Paying someone on a salaried basis does not automatically relieve the employer of the obligation to pay them overtime
- In recent years, more employees bringing claims for unpaid wages based on after-hours demands

Step One: Avoid Claims from Off-the-Clock Work

- Have a clear policy that prohibits off-the-clock work
- Make sure the policy includes specific reference to emails and texts as being “work”
- If feasible, have employees acknowledge when clocking in each day that they haven’t done any additional work since they last clocked out – and if they *have* done any work since then, they have a way to record that time
- Train everyone on the policy

Step 2: Review and Update Your Job Descriptions

- Job description should accurately describe duties and expectations
- If the job is exempt from overtime, make sure the job duties justify the exempt status
- If there are intangible but important requirements – “flexibility in scheduling,” for example, or “availability for overtime” – be sure to mention those
- Consider whether an employment contract may also be advisable

Step 3: Review/Revise Screening and Hiring Process

- Are you accurately describing the job duties and expectations?
- Use your newly updated job descriptions to guide interview questions - then look for alignment with the candidate's skills, interest, and commitment
- If you give an offer letter, make sure it accurately states the job expectations, - do not oversell “work life balance”

Step 4: Avoid Illegal Question in Job Interviews

- OCRC has useful guidance <https://www.sccc.edu/services/assets/guide-questioning-applicants.pdf>

<u>Inquiry</u>	<u>Lawful</u>	<u>Unlawful</u>
DISABILITY	Inquiries necessary to determine applicant's ability to substantially perform a specific job without significant hazard.	A. Any inquiry into past or current medical conditions. B. Any inquiry into Workers' Compensation or similar claims.
WORK SCHEDULES	Inquiry into the job applicant's willingness to work a required schedule.	Any inquiry into the job applicant's willingness to work any particular religious holidays.

Step 5: Review Employee Awards, Bonuses, and Recognition Programs

- Review benefits offerings, and consider
 - “Lifestyle” benefits that can be spent on travel or entertainment of the employee’s choosing
 - Subsidies for tuition or class fees
- Consider replacing or adding to bonuses that are based on number of hours worked
- Research comparable employers to ensure that you are paying competitively

How to Protect your Company in the Age of Quiet Quitting and the Great Resignation?

- Update job descriptions
- Review and update policy/handbook language on timekeeping, overtime, and related issues
- Training supervisors and managers on FLSA basics/not working anyone off the clock
- Consider employment agreements as appropriate
- Review hiring practices – are you identifying the best candidates, well matched to their jobs and aligned with your company culture?

Discrimination Update



Ohio Law Change – Shortened Statute of Limitations for Discrimination Cases

- Ohio Employment law Uniformity Act (2021)
- Exhaustion of remedies: Must file a charge first (no going straight to court) for civil remedies
- Two-year statute of limitations (with some carve outs)
- Largely eliminates individual liability for supervisors

EEO/ Diversity Training – Another Evolving Area

- Is Florida a predictor of what is to come in Ohio?



Florida “Stop Woke Act”

- Florida statute prohibits employers from providing “training or instruction that...promotes...or compels [an employee] to believe specific concepts constitute discrimination based on race, color, sex, or national origin.”

Florida law – Training may not:

- Teach that people of one race, color, sex or national origin are “morally superior” to those of other groups [Note: no reference to disability or religion]
- Discriminate against someone based on those characteristics to “achieve diversity, equity, or inclusion”
- Suggest that someone “bears personal responsibility for and must feel guilt, anguish, or other forms of psychological distress” because of actions “committed in the past” by members sharing their characteristics.

Florida Law on Hold due to legal Challenges

- Court: Law is unclear
- Language of the statute: Employers *cannot* endorse the view that “[m]embers of one race, color, sex, or national origin *cannot and should not* attempt to treat others *without* respect to race, color, sex, or national origin.”
- District Court: This provision “features a rarely seen triple negative, resulting in a cacophony of confusion.”



WHAT YOU ALLOW . . .

YOU TEACH — AND:



WHAT YOU IGNORE ...

YOU ENDORSE

QUESTIONS?

