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COVID Recovery Trends: Management & Legal Challenges, PropertyCasualty360, author Louie Castoria, April 5, 2022

It is getting harder to fill job openings and retain existing employees. HBR's survey of compensation increases shows a doubling of raises to 4% as compared to the 2% historical norm. But not all businesses can compete in an upward spiraling "top dollar" arena. HBR notes, "[W]e are seeing some employers reduce the number of hours worked by employees and keeping compensation flat . . . Ultimately, we're likely to see a handful of organizations adopt 32-hour work weeks with the same compensation as a new way to compete for knowledge workers." Companies with lagging performance may scapegoat virtual workers. Those that experience increased employee turnover may think their virtual workers are the cause, though that may not be so. Some employers are concerned that distant employees are working at multiple jobs; others fear a loss of the company's culture. . . . Demanding employees return to the office will only further exacerbate turnover rates

By all accounts Americans are on a bumpy road to recovery from the COVID-19 pandemic. Along with the tragic loss of lives, COVID disrupted in-person communication and commerce, with lasting effects on how people live, work, and connect.

On January 13, 2022, "Harvard Business Review" (HBR) published a forecast of challenges business managers will face during this COVID recovery season, titled, "11 Trends that Will Shape Work in 2022 and Beyond." Building on those predictions, this two-part article examines some of their legal implications. Part 1 of this article focuses on the first five trends: increasing emphasis on fairness and equity; varying workplace vaccine mandates; shortening of work weeks; increasing turnover; and automating managerial tasks. Part 2 will address the other six.

Part 1

Trend 1: Fairness and equity will define organizations. HBR terms issues such as diversity, equity and inclusion ("DEI") "flashpoints in society." HBR studied Standard and Poor's 500 CEOs' earnings calls from 2018 through 2021 and found a 658% increase in DE&I discussions.
"Talking" may be the key word. Treating DE&I in practice as aspirational raises legal eyebrows. Imagine a CEO being cross-examined at trial: "Your company's website, diversity policy and billboards say you're 'inclusive,' but your records show only 4% of your directors are diverse and 5% are women. Were you aware of that when you fired my client, who is both?"
CEOs have given investors a "lot more talk," but, to paraphrase country music star Toby Keith, need "a lot more action."

Trend 2: The vexing question of vaccine mandates. HBR cites a survey by Gartner, Inc., finding human resources directors expect they'd see nearly 7% of the workforce quit if vaccination mandates were issued — 15% in some areas. HBR also notes the legal risks of imposing such mandates.
Balancing litigation risks for issuing mandates, federal and state laws impose safe-workplace duties on most employers. California's Department of Industrial Relations requires that "for indoor locations, the employer shall … maximize ventilation with outdoor air;" install "the highest level of filtration efficiency compatible with the existing system;" and evaluate whether High-Efficiency Particulate Air (HEPA) or other filtration units would reduce the risk of COVID-19 transmission.
Health regulations are not all cut from the same cloth, they are more of a surrealistic quilt. Corporate vaccination policies should be in line with federal, state and local requirements, and contractual commitments that dictate vaccination. Companies with locations in many jurisdictions should tailor their vaccination requirements for the given locality.

Trend 3: The four-day workweek. It is getting harder to fill job openings and retain existing employees. HBR's survey of compensation increases shows a doubling of raises to 4% as compared to the 2% historical norm. But not all businesses can compete in an upward

spiraling “top dollar” arena. HBR notes, “[W]e are seeing some employers reduce the number of hours worked by employees and keeping compensation flat . . . Ultimately, we’re likely to see a handful of organizations adopt 32-hour work weeks with the same compensation as a new way to compete for knowledge workers.”
Would a 32-hour work week apply to everyone, and, if so, can the organization succeed with a 20% cut in productivity? Like pay raises, they must be applied fairly. If women or persons of color, for example, are disproportionately left out of the program (all other things being equal), that’s reason for concern. Fairness includes reasonable accommodations for workers with ADA-recognized disabilities that reduce their capacity to work.

Trend 4: Remote work may inadvertently lead to increased turnover. As HBR puts it, “Flexibility around how, where, and when people work is no longer a differentiator, it’s now table stakes.” Employers who ignore this “will see increased turnover as employees move to roles that offer a value proposition that better aligns with their desires,” HBR predicts.
HBR notes, however, that greater flexibility might increase turnover because remote workers tend to have weaker social bonds with their colleagues, making them more likely to jump ship. HBR reports that the attrition risk exists even where workers are required to come to the office once or twice a week. Loyalty remains the weak force. The strong force: higher pay or better opportunity.
Employers cannot prevent turnover but can enforce reasonable noncompetition clauses that don’t deprive the wandering employee’s ability to earn a living, though not with the company’s proprietary information or trade secrets.

Trend 5: Automating managerial tasks. Managers’ work is often repetitive — scheduling, approving expense reports, and following up on delegated tasks — and can be performed with existing technology.
Louie Castoria (Credit: Kaufman, Dolowich & Voluck)
HBR foresees other tasks being automated, even giving employees performance feedback: “Our research shows that up to 65% of the tasks that a manager currently does has the potential to be automated by 2025.”

How will automation affect management liability, the risks typically insured under directors and officers liability policies? Who will be responsible for machine errors, the CEO or IBM? If the last two years have taught us anything it is how to adapt to the unexpected.

Part 2

Trend 6: Measuring performance using remote technology. It is hard to evaluate an employee’s performance from a distance. According to HBR, “This leads to inaccurate and potentially biased performance ratings based upon where employees work rather than the impact they are having.” In an HBR survey of 3,000 managers, nearly two-thirds believed in-office personnel are higher performers, and three-quarters believed in-office workers are more likely to be promoted. These beliefs can stack the deck against remote workers. HBR recommends using “the same tools that employees are currently using to work in a virtual environment,” and “new technologies [that] will be able to provide background information about the other people on the call.”
Employment evaluations are inaccurate if they are swayed by biases. If the criterion was the employee’s national origin or gender, rather than location, it would clearly be discriminatory. To combat the implicit bias, managers should consider regular discussions online with remote workers.

Trend 7: Managing a hybrid workforce and returning to the office. HBR reports that some high-profile companies may eventually revert to their pre-COVID mode of work. This reversion may say more about management than employees.
HBR identifies the following incentives. Companies with lagging performance may scapegoat virtual workers. Those that experience increased employee turnover may think their virtual workers are the cause, though that may not be so. Some employers are concerned that distant employees are working at multiple jobs; others fear a loss of the company’s culture. . . . Demanding employees return to the office will only further exacerbate turnover rates.
Such business considerations have legal implications. A “return to the office” mandate may violate commitments made to employees who joined during COVID or enforced procedures unfairly. Any major changes in personnel policies should be vetted by human resource professionals and employment practices attorneys.

Trend 8: Wellness will become the newest metric. “In 2022, organizations will add in new measures that assess their mental, physical and financial health . . . to more accurately predict employee performance and retention,” HBR predicts.
It has already begun. As of 2020, 94% of large employers surveyed had already invested in employee well-being programs, including increased funding for mental health benefits (85%), physical well-being (50%), and financial well-being (38%).
From a legal standpoint, the key consideration of such benefits should be to confidentiality. A single breach of confidentiality by benefit providers could damage a wellness program’s integrity.

Trend 9: A ‘Chief Purpose Officer’ in the C-suite? Should businesses have opinions on social issues? HBR, citing another survey, noted that “three out of four employees expect their employer to take a view on the societal and political debates of the day.” But the survey also found that “employee engagement can drop by one-third when employees are disappointed with their employer’s stance[.]”
Some organizations are considering a Chief Purpose Officer. This C-level officer’s role would be a combination of duties related to some aspects of human resources, legal and communications. “Mission Director,” might be a more fitting title, so the role and the message align with the company’s mission statement.
The Supreme Court has held that organizations have free speech rights. As with any form of speech, the speaker’s message may turn away some people, including some employees.

Trend 10: Sitting, “the new smoking?” Many work-from-home employees have been sitting too long at their home desks. Getting up and moving around can prevent embolisms that could lead to strokes. HBR commented, “Some companies will go too far and elicit a backlash from employees who don’t think their employer has a role in their physical health. These physical wellness programs also carry DEI [diversity, equity and inclusion] risks, as they could harm the engagement of employees with disabilities.”
As with any intrusion into employees’ health matters, don’t force it.

Trend 11: DEI outcomes may worsen. HBR’s final trend brings together many of the prior ones: “[I]n a hybrid world, women and people of color prefer to work from home compared to white men. Given that, without intervention, gender wage gaps will widen and the degree of diversity within leadership benches will weaken. Without greater intentionality, underrepresented talent could be excluded from critical conversations, career opportunities and other networks that drive career growth.” DEI thus forms the bookends of the HBR article, and this one.
Empathy is key to facing these challenges: Creating policies that empower every earnest colleague to perform at his or her best, recognizing their achievements, and rewarding them for their dedication to the organization and its mission.

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