

Managing Fallout From the Great Resignation

#staffinglaw

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The Great Resignation

- The Covid-19 pandemic has caused increased stress, anxiety, and depression for many people, but particularly for those suffering from pre-existing mental illness.
- Workplace mental health has been dubbed the “echo pandemic.”
- Employees have reported quitting rather than going back to the office, and the pandemic has led many to think about how they want to balance their time.
- 57 million people left jobs—many more than once—in the 14-month period from January 2021 to February 2022 (25% more than prepandemic).
[marketwatch.com/story/the-great-resignation-pfff-call-it-the-great-rehiring-or-great-job-hop-instead-11649261180](https://www.marketwatch.com/story/the-great-resignation-pfff-call-it-the-great-rehiring-or-great-job-hop-instead-11649261180)
- “Great Resignation” is a misleading term because people are not resigning to sit at home (unemployment rate=3.6%).

Navigating the Termination Process

- **Exit checklist/process**
 - Satisfy legal obligations relating to terminating employees
 - Final pay obligations
 - Employment notices/COBRA
 - Address operational transitional needs
 - Protect company property and resources
 - Address client contract issues

Types of Termination

- **Definition can vary by statute but often includes any separation of employment**

- **Main types of termination**
 - *Voluntary—employee initiated*
 - Resignation
 - Job abandonment

 - *Involuntary—employer initiated*
 - Layoff
 - For-cause dismissal
 - Other discharge/dismissal

- **Documentation**

Final Pay Obligations

- **Know your state-specific rules—three main issues to determine**
 - *Time for payment (i.e., last day, next payday, within seven days, demand requirement)*
 - *What needs to be included?*
 - Final wages
 - Earned commissions or bonuses
 - PTO (state law or policy/contract)
 - If not required, should you link payment to appropriate notice?
 - *Damages/penalties for noncompliance*

Final Pay Obligations—California

Time for payment

- Discharges—immediate payment (Cal. Lab. Code, § 201)
- Resignations/quits—if less than 72 hours notice, within 72 hours; if more than 72 hours notice, on last day (Cal. Lab. Code, § 202.)
- Temporary workers (Cal. Lab. Code § 201.3)—next regular payday after assignment ends. (This section does *not* apply to early discharges/terminations/resignations—Labor Code sections 201 and 202 control.)
- Special industry/occupation rules may apply

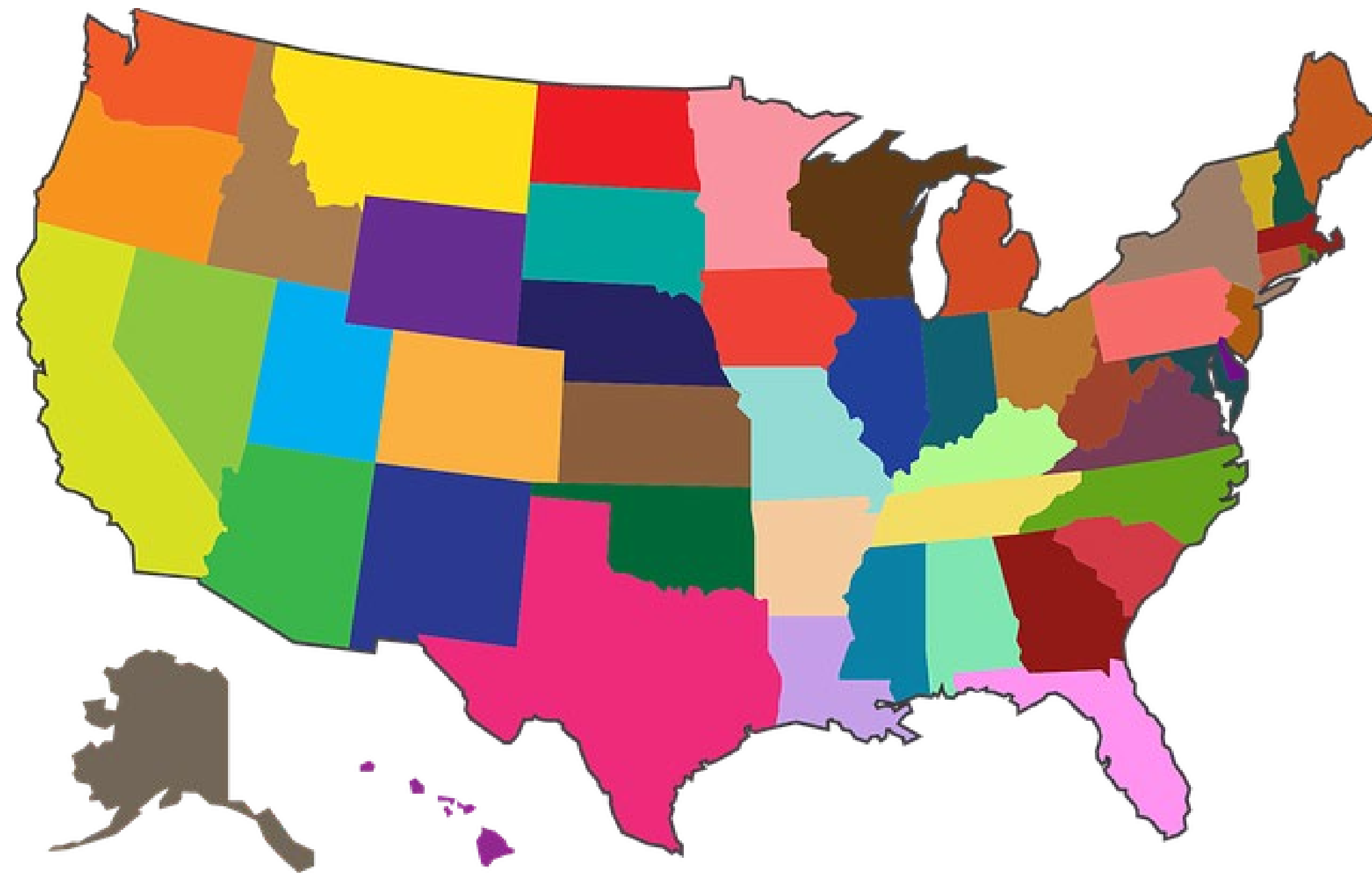
What needs to be included?

- Final wages
- Earned commissions/bonuses
- Accrued and unused PTO or vacation (*Suastez v. Plastic Dress Up*, 1982, 31 Cal.3d 774)

Damages or penalties for noncompliance (Lab. Code 203)

- *“If an employer willfully fails to pay...any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but the wages shall not continue for more than 30 days...”*

Final Pay Obligations—Other States



Employee Notices

- State-specific notices
- COBRA requirements
- Unclaimed wages

Client Contract Issues Relating to Temporary Worker Resignations

- Cancellations (notice requirements and fees)
- Return of equipment/property
- Impacts on KPIs/SLAs
- Conversion fees (if leaving for the client)
- Indemnification provisions

Recruiting Strategies

- **Optimize websites for mobile viewing**
 - Employers are losing a lot of opportunities by forgetting to create a mobile-friendly experience for job seekers
- **Relax drug testing and background check requirements**
 - Aligned with some new state/local laws
 - Be consistent
 - Communication with clients
 - Ensure doing so does not violate staffing services agreements
 - Risk: Negligent hiring lawsuits, PR concerns, client concerns
 - Risk: Allowing employees to start before background is cleared
- **Relax other eligibility requirements**
 - Years of experience
 - Management experience
 - Screening/personality testing (be mindful of EEOC/state A.I. initiatives)

Recruiting Strategies

- **Wages and benefits**

- *Increase wages or commission plans*
 - According to the U.S. Bureau of Labor Statistics, 20.5% of all private-sector employers increased base wages during the pandemic
 - 5.6% average annual increase last year vs. 2.3% in 10 years prior
- *More robust benefits*
 - Health insurance for dependents, vacation/PTO, retirement
- *Signing bonuses*
 - State law and potential FLSA issues if you require repayment

Recruiting Strategies

- Referral bonuses
- Diversity recruiting sources
 - *High schools, vo-tech schools, colleges*
 - *Career fairs*
 - *Local media*
 - *Social media and videos*
 - Ensure search terms are not discriminatory (See e.g., *CWA, et al. v. T-Mobile US Inc., Amazon.com Inc., et al.*, Case 5:17-cv-07232 (N.D. Cal. 2017))
 - *Job boards*
- Focus on employee culture, engagement, lifestyle issues
- Alternative schedules (e.g., 10 four-hour days)

Retention Strategies

- Flexible work schedules
- Remote work
 - According to BLS, as a result of the pandemic, 34.5% of employers increased telework for some or all their employees—of those, 60.2% expect telework to be permanent
- Casual dress
 - Be mindful of CROWN Act and hairstyle discrimination laws
- Milestone/longevity bonuses
- Diversity and inclusion
- Mentorship programs
- Employment agreements (pros/cons—at-will employment cuts both ways)
- Employee recognition software
- Market analysis—know what your competitors are paying/offering and match or exceed
- Profit sharing or ownership interests for key, longstanding managers
- Other perks (awards/recognition, amenities, training, gas subsidies, wellness programs, etc.)

Downstream Liabilities

- When the labor market and the economy cool down, employers will “upgrade” talent.
- Terminations based on replacing a “B” résumé with an “A” résumé can be difficult to defend.
- Particular problems can arise when the termination documentation just refers to an “upgrade” or a “restructuring.”
- Remote workers will be the first to go in some businesses due to the lack of personal connection, turning the table on job-hopping employees.

The Calm Before the Storm

- 71% of employers have seen either no increase or a mild decrease in employment litigation during the pandemic
- 43% of employers in the Pacific region have seen an increase in employment litigation during the pandemic
- Only 17% have seen an increase in the Atlantic region
- Only 10% of employers have faced a Covid-19-related workplace lawsuit or demand during the pandemic, which may reflect pent-up demand

The Calm Before the Storm

- EPLI carriers expect claims to increase due to multiple causes:
 - The upgrade factor—better options available
 - Economic decline—recession
 - Courts and plaintiffs' attorneys resuming regular operations
 - Employee empowerment
 - Heightened employee education

Keeping Clients When Employees Leave

- The availability of noncompetes is limited by state law and evolving federal limitations.
- Nonsolicitation and nonpoaching agreements are becoming easier to challenge under state laws as well.
- Customer agreements with noncompete, conversion fee, and poaching provisions also a potential problem.
- Nondisclosure agreements still a good option, but they are only as good as the processes in place to treat confidential information as if it is confidential.

Exit Procedures When Key Employees Leave

- Discontinue remote electronic access
- Remove devices from circulation
- Inspect key employee devices and email
- Get written confirmation of return of property and records
- Remind key employees of contractual obligations
- Potential co-worker interviews
- Client transition plans